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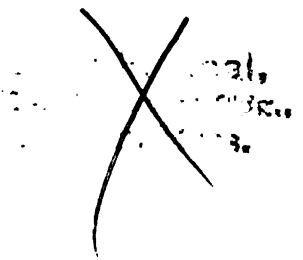

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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

BY THERON METCALF.

VOLUME I.

BOSTON:
LITTLE, BROWN AND COMPANY,
1863.

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JUDGES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. LEMUEL SHAW, CHIEF JUSTICE,
HON. SAMUEL PUTNAM,
HON. SAMUEL S. WILDE,
HON. CHARLES A. DEWEY,
} JUSTICES.

ATTORNEY-GENERAL.

HON. JAMES T. AUSTIN.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTIES OF SUFFOLK AND NANTUCKET, MARCH TERM 1840, AT BOSTON.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE,
HON. SAMUEL PUTNAM,
HON. SAMUEL S. WILDE,
HON. CHARLES A. DEWEY,
} JUSTICES.

MEMORANDUM. On the eighteenth day of January, 1840, the Hon. MARCUS MORTON, by accepting the office of Governor of the Commonwealth, resigned the office of Justice of this Court, which he had held since July 4th, 1825.

On the 23d of March, 1840, the legislature passed an act, declaring that "the number of the Justices of the Supreme Judicial Court shall be four only."

EDWARD W. TRYON & others *vs.* THOMAS WHITMARSH.

Fraud in the defendant, and damage to the plaintiff, are the gist of the action for a deceitful representation that a third person is entitled to credit.

Such action is not supported by proof that the representation was unwarranted and groundless. It must also be proved, that the defendant did not believe his representation to be true.

THIS was an action of trespass upon the case, for an alleged false and fraudulent representation by the defendant, that Thomas James and William Whitney were entitled to credit, whereby the plaintiffs were induced to give them credit on a sale of goods, for which they could not pay. This repre-

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sentation was contained in the following letter, addressed to Messrs. Lynde & Jennings of New York. "Boston, April 18, 1836. Gentlemen: Allow me to introduce you to Mr. W. Whitney, of the firm of James & Whitney, successors of Staples & Nichols. Should he want to purchase goods in New York, you can recommend him with perfect confidence as being entitled to credit; and if my name should be required, he will explain the proposition I made to them. Yours, &c Thomas Whitmarsh."

At the trial before the chief justice, it was proved, that upon the plaintiffs' inquiring of W. T. Jennings, one of the firm of Lynde & Jennings, whether James & Whitney could safely be trusted, he showed the plaintiffs this letter. It was also in evidence, that Staples & Nichols, mentioned in the letter, failed in January, 1836, and made an assignment of their property for the benefit of their creditors; that the defendant was their principal creditor, they owing him from twelve to sixteen thousand dollars, and that his was a preferred debt; that he advised James & Whitney to buy the stock of Staples & Nichols, which was assigned, and to commence business as their successors, in a shop in Congress Street, Boston; that they bought this stock of the assignees, in March, 1836, and gave a note therefor, payable on demand, for $ 13,800, the defendant having agreed with the assignees to take the note as payment, to that amount, of his debt secured by said assignment, and having also agreed with James & Whitney, that they might select such part of said stock as should suit them, and that he would take back the residue and indorse the appraised value thereof on said note; that James & Whitney selected goods from said stock to the amount of about $ 10,000, for which they paid the defendant, during the summer of 1836, about $ 3,100; and that the defendant held the note for $ 13,800 until the autumn of 1836, when James & Whitney took it up and gave him other notes, dated in March of that year, payable on demand, for the balance that was due to him.

It appeared, that in the summer of 1836, James went into the Western States, and took with him a considerable amount of the

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stock of the firm, and was absent several weeks; that Whitney made evasive answers, when inquired of concerning James's absence, and the place to which he had gone; and that the defendant expressed an apprehension that all was not right in the concerns of the firm. Early in February 1837, James & Whitney removed much of their stock into a shop in Ann Street, which they were about to open for the purpose of making additional sales. About this time some of their property in the shop in Congress Street was attached by one of their New York creditors; and the defendant, finding that the stock was diminished, and not knowing for what purpose or to what place it had been removed, commenced a suit on his notes aforesaid, attached all the goods of James & Whitney, and thereby broke up their business.

James testified, that the defendant had agreed to indorse, if required, the notes that James & Whitney might give for goods, in New York, for a premium of five per cent. He also testified that the defendant had explicitly agreed to give the firm a credit of one, two, and three years, on the stock purchased by them of the assignees of Staples & Nichols. But there was evidence tending to discredit this part of his testimony.

The judge, after instructing the jury on all the points in the case, told them, in conclusion, that the plaintiffs, in order to recover, must prove, 1st. That the letter was written by the defendant. 2d. That it was communicated to the plaintiffs, and that they trusted to it. 3d. That they would not have given the credit without it. 4th. That it was substantially false, and that the persons recommended were not worthy of credit. 5th. That the defendant knew all the facts on which their title to be deemed of good credit rested. And 6th. That the plaintiffs lost their debt in consequence of it.

The defendant's counsel requested the judge to instruct the jury, that if the defendant, when he wrote the letter, really and sincerely believed that the opinion expressed therein was true, he was entitled to a verdict in his favor, unless the jury believed that a man of common and ordinary capacity for business could not sincerely entertain such an opinion.

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The verdict was for the plaintiffs; but if the directions given to the jury were wrong, it is to be set aside and a new trial is to be granted.

Choate and *Watts*, for the defendant. Fraud and falsehood in the defendant must concur to sustain this action. *Ashlin* v. *White*, Holt N. P. 389. *Benton* v. *Pratt*, 2 Wend. 385 *Young* v. *Covell*, 8 Johns. 23. *Gallager* v. *Brunel*, 6 Cow. 352. *Russell* v. *Clark's Executors*, 7 Cranch, 92. Falsehood does not necessarily import or include fraud. It must be known falsehood in order to be fraudulent. *Patten* v. *Gurney*, 17 Mass. 184. *Weeks* v. *Burton*, 7 Verm. 70. *Lord* v. *Colley*, 6 N. Hamp. 99. *Freeman* v. *Baker*, 5 Barn. & Adolph. 805.

There are two classes of cases; viz. a representation of facts, and an expression of opinion. As to the first, honest belief is all that is required; and so as to the second. *Fari quæ sentias*, is the morality and the law of both classes of cases. *Haycraft* v. *Creasy*, 2 East, 92. *Clifford* v. *Brooke*, 13 Ves. 131. *Gainsford* v. *Blachford*, 6 Price, 36. 3 Bos. & Pul. 371, per *Chambre*, J. 8 Taunt. 642, per *Dallas*, C. J., and *Park*, J. 6 Johns. 184, and citations there made from the civil law.

If the defendant had undertaken to assert facts, and had suppressed the circumstances respecting his demand on James & Whitney, he would be liable in this action, if such suppression was fraudulent. But he merely gave an opinion, and was not bound to mention any unfavorable facts. *Gainsford* v. *Blachford*, 6 Price, 36. *Wood* v. *Wain*, 1 Esp. R. 444. In *Eyre* v. *Dunsford*, 1 East, 318, and in *Corbett* v. *Brown*, 8 Bing. 33, the suppression of a fact amounted to a direct misrepresentation.

As the case was put to the jury, they were left to infer, that if they deemed the opinion, expressed in the defendant's letter, to be unfounded, they should find for the plaintiffs. They should have been instructed as the defendant's counsel requested. That request contained the precise law of the case; and as the instruction was not given, the defendant is entitled, for that reason, to a

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new trial Graham on New Trials, 277. *Scott* v. *Lunt*, 7 Pet. 607.

B. Sumner and *E. G. Austin*, for the plaintiffs, admitted that falsehood and fraud must both be proved, and that the defendant must know that what he says or writes is false, in order to his being charged. But in such cases, knowledge is nothing more than good reason for belief; and it was for the jury to decide whether the defendant had good reason to believe that James & Whitney were unworthy of credit. The decision in *Pasley* v. *Freeman*, 3 T. R. 51, established the true doctrine of this class of cases, and it has never been impugned by any adjudication. *Clifford* v. *Brooke*, 13 Ves. 133. *Evans* v. *Bicknell*, 6 Ves. 186. *Polhill* v. *Walter*, 3 Barn. & Adolph. 114. *Eyre* v. *Dunsford*, 1 East, 318. The case of *Haycraft* v. *Creasy*, 2 East, 92, lacked every thing that was necessary to maintain the action.

The case at bar is supported by *Foster* v. *Charles*, 6 Bing. 396. *S. C.* 7 Bing. 105. *Corbett* v. *Brown*, 5 Car. & P. 363. *Ward* v. *Center*, 3 Johns. 271. *Upton* v. *Vail*, 6 Johns. 181. *Hutchinson* v. *Bell*, 1 Taunt. 558. The old actions for a deceit bear strongly on cases of this nature, and several of them are cited with approbation by *Buller*, J. in *Pasley* v. *Freeman*. See also Yelv. 21 *a*, *note* (1). *Dale's case*, Cro. Eliz. 44. *Bayly* v. *Merrel*, Cro. Jac. 386.

The instructions given to the jury, when taken together, presented the law as the defendant's counsel insist that it should have been; and the six points, on which they were finally told that they must be satisfied by the proof, contain substantially the doctrine of the specific instructions prayed for. The practice of granting new trials, because the judge omits to give instructions in the form prescribed by counsel, has never been adopted by this court.

The opinion of the court was delivered by

Wilde, J. The principle of law on which this action is founded is well settled, and the question to be decided is, how it is to be applied to the point in controversy between the parties. It is alleged in the declaration, that the defendant fraudulently and de-

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ceitfully represented to the plaintiffs, that certain persons named in the writ were in good credit, and might safely be trusted, when in truth they were insolvent and wholly unworthy of credit: That the plaintiffs were thereby induced to give them credit, and have in consequence thereof sustained a loss. The gist of the action is fraud and deceit in the defendant and damage to the plaintiffs, and unless both these material allegations be proved, the action cannot be sustained. The leading case in which the law in this respect was fully considered and settled is the case of *Pasley* v. *Freeman*, 3 T. R. 51. The question arose on a motion in arrest of judgment. The declaration contained allegations similar to those above stated, and a majority of the court held that the dec laration was good, and that the action would well lie. *Grose*, J. dissented, on the ground, that it was not alleged in the declaration that there was any privity of contract between the parties, or that the defendant had any interest in the transaction, or that he had colluded with any one who had an interest. The other learned judges held that these circumstances were not material, and that the foundation of the action was fraud and deceit in the defendant and damage to the plaintiff, and that these allegations being proved, an action might be sustained. And so the law has uniformly been laid down in all the subsequent cases. Lord *Eldon*, it is true, (6 Ves. 186,) doubted whether an action in such a case would be sustained in a court of law, although he admitted the party would be entitled to relief in equity.

In *Haycraft* v. *Creasy*, 2 East, 92, the defendant had assured the plaintiff and son's agent that one Robertson was a lady of great fortune, and much greater expectations, and that the plaintiff would be perfectly safe in giving her credit to any amount; and that he knew this of his own knowledge. These assurances were repeatedly made, but it turned out that the person recommended was in truth a person of no credit. On this evidence the jury, on a trial before Lord *Kenyon*, found a verdict for the plaintiff, and on a motion for a new trial, Lord *Kenyon* was of opinion that the verdict was well sustained by the evidence, on the ground, however, that the defendant was guilty of a legal fraud, which consisted "not in the defendant's saying that he

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believed the matter to be true, or that he had reason so to believe it, but in asserting positively his knowledge of that which he did not know." "That he was, therefore, guilty of a gross falsity; and that it was a juggle to say that the defendant's words in common parlance did not import knowledge in the strict sense of it." But a new trial was granted, because the case had gone to the jury on the ground, that, though the defendant were himself a dupe, yet if the representation made by him were false, he was answerable; and because the words of the defendant were not to be taken in the strict sense in which a lawyer would use them, but as expressing a strong opinion of the truth of his assertion, from circumstances within his own knowledge. "It is true," says *Grose*, J., "that the defendant asserted his own knowledge upon the subject; but consider what the subject was of which that knowledge was predicated. It was concerning the credit of another, which is matter of opinion. When he used those words, therefore, it is plain that he only meant to convey his strong belief of her credit, founded upon the means he had of forming such an opinion and belief."

It appears therefore very clearly, that there was no diversity of opinion between the learned judges, as to the law, although they differed as to its application to the evidence in that case. All agreed, that to maintain the action there must be proof of fraud in the defendant, and that if he knew the representation he made was false, that would amount to a legal fraud, although he might have no interest in the matter and might expect no advantage therefrom. That was the doctrine in *Pasley* v. *Freeman*, and it has been followed with great uniformity of opinion ever since. In *Clifford* v. *Brooke*, 13 Ves. 133, it is clearly and distinctly stated by Lord *Erskine*. "The proposition," he says, "is not, that if a man, asked whether a third person may be trusted, answers, 'you may trust him; he is a very honest man, and worthy of trust,' an action will lie, if he proves otherwise. There must be knowledge at the time. That is the sound principle; that the defendant, knowing that person to be dishonest, insolvent, and unworthy of trust, made the representation." The plaintiffs counsel relied on the case of *Foster* v. *Charles*, 7 Bing. 105, to

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show that actual fraud is not necessary. But the same doctrine is maintained in that as in all the other cases. The jury were instructed by the chief justice, that if the defendant made the representation, knowing it to be false, that would be such a fraud as would maintain the action.

In that case, the jury found that the defendant was guilty of fraud in law, but that he had no fraudulent intent. And judgment was rendered on the verdict, the court being of opinion that as to the fraudulent intent the jury meant no more than this, that the defendant was not actuated by the baser motive of obtaining by his misrepresentations an advantage for himself.

The law being thus clearly established, the only question is, whether it was fully and sufficiently laid down in the instructions to the jury; or whether the case was not so left to them, that they might infer that it was not necessary to inquire, whether the defendant knew that the assertion contained in his letter was false.

Now, we are of opinion, that all the six propositions, which the jury were told the plaintiffs must prove, in order to entitle them to a verdict, might have been affirmatively proved to the satisfaction of the jury, and yet the defendant might have been guilty of no fraud, and might have truly believed that the assertion contained in his letter was true. It does not follow, because the jury were of opinion that the persons recommended were unworthy of credit, that the defendant, with a full knowledge of all the facts proved, was of the same opinion. Persons of equal intelligence, with the same means of information, and the same knowledge of facts, often form different and conflicting opinions. Their habits of thinking and of reasoning may differ. Some are very credulous, and are easily duped, or deceived by appearances, while others are very suspicious, cautious, and skeptical, so that there is no standard of opinion, except in very clear cases. Undoubtedly there are cases, in which the same evidence would impress all reasonable minds with the same conviction. But this was not such a case. The evidence was doubtful, from which two juries* have drawn different inferences.

* In a similar action by Lynde & Jennings against Whitmarsh, the defendant obtained a verdict.

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We are, therefore, of opinion that the question for the jury was, whether the defendant knew that the assertion or opinion contained in his letter was false, or that he did not fully believe it to be true; or whether he did not conceal a material fact from the knowledge of the plaintiffs, with the intention to deceive them. It is true, as the defendant's counsel have argued, that the defendant was not bound to disclose the facts on which his opinion was founded; but if he kept back any material fact, with the intent to deceive the plaintiffs, this would be fraudulent. If, on the other hand, he had trusted the persons recommended to a large amount, believing them trustworthy, then his omission to disclose the facts on which his opinion rested would be no presumptive proof of fraud.

Perhaps it is not material in which form the question is to be left to the jury, whether the defendant were guilty of a fraudulent concealment, or of making a false affirmation, knowing it to be false. The evidence which would support one of the allegations would probably support the other. The question is whether the defendant gave an honest opinion, or was actuated by some fraudulent intention. And as this question was not distinctly left to the jury, we think the defendant is entitled to a new trial.

The jury must have understood, that if they should be of opinion, that the six propositions stated to them were sustained by the evidence, the defendant would be liable, although he might sincerely believe that the assertion contained in his letter was true. But we think they should have been instructed, that notwithstanding they should find all the said propositions in favor of the plaintiffs, still the defendant would not be liable, if they were of opinion, from the evidence, that he gave an honest opinion, and truly believed that the persons recommended were trust worthy.

New trial granted.

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William Shattuck *vs.* Watson Freeman.

When property is assigned, conformably to the *St.* of 1836, *c.* 238, a creditor of the assignor cannot treat the assignment as void, and attach the property, on the ground that no creditor executed the assignment within a reasonable time, and before the attachment; nor because the property remains in the assignor's hands as agent of the assignee, and is neglected or mismanaged. The remedy of creditors, in such case, is against the assignee, under the provisions of § 7 of that statute.

Trespass *de bonis asportatis*. It appeared at the trial before *Putnam*, J. that David Carver Junior, on the 29th of July, 1837, made an assignment of his property to the plaintiff, conformably to the statute of 1836, *c.* 238; and that so much of the property, mentioned in the schedule annexed to the assignment as being in a store in Court Street, in Boston, was delivered to the plaintiff. The defendant, a deputy sheriff, on the 23d of January, 1838, attached the goods described in the writ, at the suit of John G. Wyman against the said Carver, and afterwards, on the petition of said Wyman, caused them to be appraised and sold at auction. At the time of the attachment, the goods were in the hands of Carver as agent of the plaintiff. Immediately after the attachment was made, the plaintiff gave notice to the defendant that the goods were covered by the assignment, and requested him to give them up.

No one of Carver's creditors became party to the assignment, (though they all had notice that it was made,) until after the attachment; but they had held a meeting under the assignment before the attachment.

When the assignment was made, Carver occupied said Wyman's shop, No. 8 Court Street, at a yearly rent of $650, payable quarterly, and taxes. On the 1st of January, 1838, he removed to another shop, of which the yearly rent was $400. At the time of his removal, one quarter's rent and the taxes were due to Wyman; the plaintiff having paid him the rent up to the 1st of October, 1837.

Carver was in possession of the assigned property, as agent of the plaintiff, from the time of the assignment to the time of the attachment, and sold articles from the stock, and paid over to the

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plaintiff all the money that he received from sales thereof, except the weekly sum of $9·50, which was the expense of his own board and that of a man and a boy, and which was paid from the proceeds of the assigned property. Several of his creditors, however, had been paid by him in full, by goods taken from the assigned stock, and they had given him up his notes, &c. To several other creditors he had also delivered goods out of the same stock, and charged them as sales.

Between the day of the assignment and that of the attachment, no step was taken towards the making of a dividend; but Carver and the plaintiff were about making an agreement to sell the remaining goods to an individual, with the knowledge and at the desire of some of the creditors.

On this evidence, the defendant requested the judge to instruct the jury that the plaintiff was not entitled to recover; but the jury were instructed, that the plaintiff was entitled to a verdict, and that they should award such damages as would put him in as good a condition as he was when the attachment was made. A verdict was returned for the plaintiff, which is to be set aside, and a new trial to be granted, if the jury were misdirected.

E. G. Austin, for the defendant.

All points as to assignments, not provided for by the statute of 1836, *c.* 238, are to be decided by the common law. By that law, property is not secured from attachment if the creditors refuse or neglect to become parties to the assignment. *Widgery* v. *Haskell*, 5 Mass. 144. *Halsey* v. *Fairbanks*, 4 Mason, 206. *Harris* v. *Sumner*, 2 Pick. 129.

The fifth section of the statute of 1836, which directs that notice shall be given to the creditors, as soon as may be, shows that they should come in within a reasonable time; which was not done in this case.

The conduct of the assignor and assignee was fraudulent. The spirit of the statute, as well as its letter, is to be obeyed; and the spirit of it is that a *pro rata* distribution shall be made to all the creditors. Some of them, however, were paid in full.

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It may be said, that the plaintiff should have applied to this court to remove the assignee. But the statute is not compulsory; and no creditor, who has not executed the assignment, can take this course. The defendant was not bound to become party to a fraudulent assignment, in order to take the statute remedy. And if the property is all wasted, or paid to part of the creditors, nothing could be gained by applying to the court.

If the assignment were originally valid, it became void by the assignor's continued possession.

Dexter and *G. W. Phillips*, for the plaintiff.

The statute of 1836 was made to enable a debtor to assign effectually for the benefit of all his creditors. After he has assigned, he is not answerable for any future proceedings.

It is not necessary that the assigned property should be delivered. *Driscoll* v. *Fiske*, 21 Pick. 503.

The creditors may become parties to the assignment at any time before a final dividend is declared; and there are good reasons for their not becoming parties before there are some steps towards the making of a dividend. A debtor might be discharged without paying any thing, if the creditors were obliged to execute the assignment sooner.

The case does not show any delegation of trust. The assignor was the most proper person to sell the goods. *Vredenbergh* v. *White*, 1 Johns. Cas. 156.

There was no abandonment of the trust by delay. Any creditor might have quickened the assignee's proceedings, by applying to this court, as authorized by the seventh section of the statute. The assignee was a trustee, and could not abandon, as against the creditors. The creditors had not abandoned the assignment; they had held a meeting under it, before the attachment, and all of them, except the plaintiff, became parties to it after the assignment. The plaintiff had received one quarter's rent of the defendant as assignee; and other creditors were urging a sale of the property.

Payment of certain debts in full was irregular, but not fraudulent. And if it were fraudulent, it did not avoid the assignment, as to other creditors under it. *Prince* v. *Shepard*, 9

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Pick. 185. See also *Smith* v. *Mills*, Moore, 594. *Hussey* v. *Fidell*, 3 Salk. 59. *Dyson* v. *Glover*, 3 Salk. 60. 1 Story on Eq. §§ 422, 423.

Dewey, J. Several objections have been taken to the validity of the title of the plaintiff to the property in controversy.

1. It is said that no creditor had become a party to the assignment, before the attachment, by expressing formally his assent to it, and therefore nothing passed by the conveyance to the plaintiff, as against creditors. It is attempted to maintain this position, by reference to the decisions of this court in cases of voluntary assignments made at common law, and before the statute of 1836, c. 238. Such undoubtedly was the rule of law as held in those cases, and such an assignment, until one or more of the creditors of the assignor had assented to the assignment, was invalid as respects attaching creditors. But one of the evils intended to be provided against by the enactment of the statute just referred to, was that of intervening attachments between the time of the execution of the assignment by the debtor, and the acceptance of the same by his creditors. In cases where the amount of property transferred was large, and the creditors numerous, it was usually found impossible to carry into full effect the provisions of the assignment; as the property was liable to a direct attachment in favor of any creditor, before any other creditor had assented to the assignment, and by the trustee process, after such assent; which latter process gave an attaching creditor a lien upon all the surplus remaining after discharging the debts of those creditors who had previously assented to the assignment.

The first section of the statute under consideration authorizes the debtor to assign his property to his creditors, or to an assignee, for the use of his creditors, and provides that such assignment shall be valid and effectual against any attachment thereafter made. It will be perceived, that this section contains no provision making the assent of any creditor a prerequisite to the vesting of the property in the assignee and the placing of it beyond liability to future attachments; and it was doubtless so framed for the purpose of avoiding the evils before alluded to, and

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thus the more effectually to secure an equal division of the property of the insolvent debtor among all his creditors. The fourth section is also in accordance with the view we have taken, as to the necessity of any express assent on the part of the creditors to give effect to the assignment, and provides that any creditors may become parties to the assignment, provided they shall apply before the final dividend is declared, subject only to the restriction, that they are not allowed to disturb any dividends already declared. This assignment was therefore proper, in point of form, and assented to and executed by all the parties requisite to give it legal effect, and must therefore be held valid, unless the other objections taken to the transfer are found sufficient to defeat it.

If there had been evidence tending to show that this assignment was entirely fraudulent in its original inception, and such circumstances had been disclosed as indicated the whole transaction a corrupt design to place property beyond the reach of the creditors, and to secure the same for the use of the debtor, it might have been proper to submit the question of fraud to the jury; but on the facts as presented here, we perceive no such ground of defence.

2. The further question, then, is as to the effect of the evidence offered to defeat this assignment, on the ground of a subsequent abandonment or surrender of the rights acquired under it. One ground here taken is, that the actual possession of the property, from the day of the transfer to the time of the attachment, has been in the debtor acting as the agent of the assignee, and in that capacity disposing of the property. We do not perceive any legal objection to the retaining of the services of the debtor, as the agent of the assignee, at a reasonable compensation, in closing the concerns of the debtor, where such assistance is needful, and he is a competent person to render this service. He is, however, to be treated with as any other servant or agent of the assignee, and for all his acts prejudicial to the interest of the creditors the assignee would be liable to the same extent, and in the same manner, as he would for the acts of any other person acting for him in such capacity. If there-

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fore, as appeared in this case, Carver, the debtor, had applied part of the proceeds of the goods assigned to the payment in full of the demands of particular creditors, to the prejudice of the remaining creditors, it will be at the risk and loss of the assignee, if the remaining estate is not sufficient to pay the proper proportionate share of the other creditors.

More reliance is probably placed by the defendant upon the evidence of neglect on the part of the assignee, to take immediate measures to convert the assigned property into available cash funds, and the omission to make any dividend among creditors. These circumstances, taken in connexion with the delay of the creditors to express their assent to become parties to the assignment, it is urged, show such a virtual abandonment of all rights acquired by the plaintiff under the assignment, as to justify any individual creditor in treating it as a nullity, and would authorize an attachment of the property as still in Carver, the debtor.

Assuming, for the purpose of properly raising this question, that the case discloses culpable negligence on the part of the assignee, and unnecessary delay in converting the property into money, and in declaring any dividends in favor of creditors, the court are of opinion, that such a state of facts would not justify the attachment by one of the creditors, for the purpose of acquiring a lien upon it in his own favor to the exclusion of other creditors, in the manner here attempted.

The remedy for such neglect or misfeasance on the part of the assignee is fully provided by the seventh section of the act under consideration, and is so regulated as to protect the rights of individual creditors, without defeating the great object of the statute, the equal distribution of the effects among all the creditors. Full power is given to this court, and also to the court of common pleas, upon the application of any creditor, to order and decree such proceedings as will secure a prompt settlement and distribution of the avails of the assigned property, and each of these courts is authorized from time to time, on such application, to make all such orders and decrees touching the matter, as the proper administration of said trust shall require;

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and this is the only remedy in such cases, for any creditor who feels aggrieved by the misfeasance or neglect of the assignee. The defendant having wholly failed to justify the taking of the property under the attachment, a verdict was properly taken in favor of the plaintiff.

Judgment on the verdict.

Josiah Finney *vs.* The Warren Insurance Company.

A part owner of a vessel may insure his actual interest therein, though he do not state to the underwriter the nature or extent of such interest. If he own part of a vessel, as administrator, he may insure it without stating the capacity in which he owns. But a part owner, insuring in his own name only, and not mentioning any other owner or person interested, can recover only the amount of his own interest.

One who owns part of a vessel has no insurable interest in the other part thereof, merely by reason of his keeping the accounts, receiving the avails, making the disbursements, and directing the voyages of such vessel.

Assumpsit on a policy of insurance, dated July 22d, 1837, whereby the defendants caused the plaintiff "to be insured, lost or not lost, $ 8000, for one year from date, on brig Heela, valued at $ 8000, against the perils of the sea."

In one count, the plaintiff claimed for an entire loss; in other counts, for his individual interest in one eighth, and for his interest, as administrator, in three eighths, and for advances. There was also a count for money had and received.

The parties submitted the case to the decision of the court upon these facts: The brig Heela of Plymouth, was built in 1834, by the six persons hereafter named, and was owned by them, and registered in their names, in the following proportions, viz. Elkanah Finney, three eighths, Josiah Finney, the plaintiff, David Finney, and Joseph Allen, one eighth each, Henry Whiting three sixteenths, and John Finney one sixteenth. Elkanah Finney died on the 3d of February, 1837, and during that month administration on his estate was committed to the plaintiff. The plaintiff kept the accounts of the brig, received the avails, made the disbursements, and directed the voyages generally, from the time she was built. In February, 1838, the

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brig sustained damages on the coast of Spain, from perils insured against.

The plaintiff, in his application for insurance, did not mention, nor did the defendants inquire, who were interested in said brig; nor did the defendants know who were interested, until after the loss.

On these facts, the court were to decide to what extent the policy attached, and what proportion of the entire loss the plaintiff is entitled to recover; and the damages were to be assessed by an auditor, upon such principles as the court should prescribe.

The defendants, at the opening of the argument, admitted their liability to pay for the one eighth owned by the plaintiff in his own right.

Derby, for the plaintiff. The defendants are liable for the three eighths owned by the plaintiff as administrator. 1 Phil. Ins. 41, and cases there cited. They are also liable for the whole amount insured. The plaintiff had a general interest in the brig; he had the care of her, made disbursements, &c. As joint owner of a part, he is entitled to recover the whole amount insured. *Page* v. *Fry*, 2 Bos. & Pul. 242. *Alsop* v. *Commercial Ins. Co.* 1 Sumner, 468. *Lewis* v. *Rucker*, 2 Bur. 1171. *Lawrence* v. *Van Horne*, 1 Caines, 284. If the plaintiff cannot recover more than one half, then he is entitled to a return of premium for short interest. *Murray* v. *Columbian Ins. Co.* 11 Johns. 302. *Toppan* v. *Atkinson*, 2 Mass. 365.

Parsons, for the defendants. The plaintiff can recover only one eighth of the loss, as he did not insure for whom it might concern. He cannot recover by virtue of his general agency as ship's husband; *French* v. *Backhouse*, 5 Bur. 2727; nor as part owner, because he did not describe his interest. *Foster* v. *United States Ins. Co.* 11 Pick. 87. He cannot recover for advances, even if he had made them. *Manfield* v. *Maitland*, 4 Barn. & Ald. 582; *Buchanan* v. *Ocean Ins. Co.* 6 Cow. 318. He had no such possession of the brig as would give him a lien. *Seamans* v. *Loring*, 1 Mason, 139. Nor can he recover the three eighths which he owned as administrator, as he did not disclose the nature of his interest.

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PUTNAM, J. The case of *Page* v. *Fry*, 2 Bos. & Pul. 242, shows that a tenant in common may insure, and that the general averment of his interest in the ship is sustained by evidence of title to an undivided part thereof. But that case did not decide (as the plaintiff's counsel contended,) that one who owns only a fractional part of a vessel can recover for her full value, where the policy is upon interest as it shall appear, or as valued. The amount of damages which the plaintiff is entitled to recover is to be determined by the proof of value. What was the interest which the plaintiff had in the Heela? He was the absolute owner of one undivided eighth part. For that part, he is entitled to recover. Elkanah Finney owned three eighths, and the plaintiff was appointed administrator of his estate, before the policy was made; and we think the plaintiff may recover for those three eighth parts. He might have made a good and valid abandonment of the property, or have given a legal discharge for the same, upon receiving payment for the loss. And it would make no difference to the defendants whether or not the plaintiff disclosed to them that he held part of the property in his own right, and part of it in trust for others. It would be sufficient to make out the proof of such interest on the trial. The authorities cited in 1 Phil. Ins. 41, establish the right of the plaintiff to recover thus far, viz. for the loss on one half of the brig. And he cannot recover any thing more.

The other half of the brig belonged to David Finney and others. The plaintiff kept the accounts of the brig, received the avails, made the disbursements, and directed the voyages generally, &c. But these circumstances do not create an insurable interest in that half of the brig. And the plaintiff had no lien on the brig, to secure any advancements, if any were made; of which, however, there is no evidence. As ship's husband, the plaintiff had no right to make insurance for any part owner, without his authority or consent. That point was determined by Lord Mansfield and his associates in *French* v. *Backhouse*, 5 Bur. 2727. But this is not, upon the face of the policy, for another part owner, but for the plaintiff himself. He had no insurable interest in the other half of the brig. He did

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not purpose to effect insurance for the benefit of the other owners, or for whom it might concern, but for himself. The contract must be construed according to its clear provisions, how much soever we may regret any mistake which may have arisen on the part of the plaintiff in procuring the same.

The result is that the plaintiff recovers for the loss as to one half of the brig, and for a return of premium for short interest, in respect to the other half; and the cause is committed to an auditor to assess the damages accordingly.

Lemuel P. Grosvenor *vs.* Henry B. Lloyd.

A dormant partner is not liable for debts of the firm contracted after a dissolution of the partnership, although he does not give notice of such dissolution.

Assumpsit for the use and occupation of a stable from April 1st to May 2d, 1835. At the trial, in the court of common pleas, before *Ward*, C. J. the evidence, so far as it bears upon the point hereinafter decided, was this: The plaintiff, in November, 1831, demised said stable, (whether orally, or in writing, did not appear,) to I. Stone, who, with D. Stone and L. Doolittle, his partners in the business of keeping a livery stable, took possession thereof, and there carried on their said business. The sign over the door was "I. Stone & Co.," and it remained unaltered until May 2d, 1835. On the first of April, 1834, Doolittle withdrew from the partnership, and sold all his right and interest therein to the defendant, who was then admitted as a partner with I. and D. Stone. The defendant gave evidence that this last partnership was dissolved on the 1st of April. 1835; and the plaintiff gave evidence of the defendant's acknowledgment that he continued to be a partner after that day. I. Stone occupied the stable from that day until the 2d of May following, when he quitted it; and he was the only active partner from November, 1831, to said 2d of May.

The judge instructed the jury "that the rent of the stable, in which the partnership business was carried on, was a fair charge against all the partners; and even if the defendant was a secret

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partner, he was liable, with the other partners, for the rent. That the defendant was a partner on the 1st of April, and had so been long before, and that if I. Stone, with the same sign over the door, and ostensibly in the same manner, occupied the stable, after April 1st, 1835, as he had done before, the plaintiff had a right to charge all the partners for the rent, until he had notice of the dissolution of the partnership."

The verdict was for the plaintiff, and the defendant excepted to these instructions.

Paine, for the defendant. A dormant partner is not liable for debts contracted after the partnership is dissolved, though notice of the dissolution be not given. 3 Kent Com. (1st ed.) 40. And if the defendant were not a dormant partner, yet he is not liable for rent. The lessee, I. Stone, was alone liable. The defendant's being a copartner did not make him a co-lessee. *Hurd* v. *Cushing*, 7 Pick. 169.

Field, for the plaintiff, insisted that the instructions did not necessarily import any thing more than that the defendant was liable *while* he was a partner; and that as there was evidence of the defendant's acknowledgment that he continued to be a member of the firm after April 1st, 1835, a new trial should not be granted merely because the instructions may have been ambiguous. He also cited *Howe* v. *Thayer*, 17 Pick. 91. *Goddard* v. *Pratt*, 16 Pick. 428.

SHAW, C. J. delivered the opinion of the court. After stating the directions given to the jury, as to the liability of the defendant, he proceeded thus: The court are of opinion, that this direction was not correct. A dormant partner is liable for debts contracted whilst he is a partner, not because credit is given to him, but because he is in fact a contracting party, taking part of the profits of such contracts. But when he ceases to be in fact a partner, the reason ceases, and he is no longer liable. He is not liable as a contracting party, because the partnership name, under which the remaining partners continue to transact business, no longer includes him, though that name may remain the same; and he is not liable as holding out a false credit for the firm, because the case supposes that he is not known

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as a partner, and therefore the firm derives no credit whilst he remains a secret or dormant partner. No customer, therefore, or other person dealing with the firm can be disappointed in any just expectations, if he silently withdraws from the firm. A very different rule would apply where one had been a known or ostensible partner, and held himself out as such.

It is stated in the bill of exceptions, that there was evidence tending to show that Lloyd admitted himself to be a partner after the first of April; but by the instructions given to the jury in point of law, the consideration of this evidence became immaterial, and the jury might have found their verdict for the plaintiff without passing upon it.

Exceptions allowed; and the verdict to be set aside, and a new trial had at the bar of the court of common pleas.

Commonwealth Insurance Company *vs.* Salmon Whitney.

A memorandum written on a note, by the maker, in these words, "for value received, I hereby acknowledge this note to be due, and promise to pay the same on demand," and signed in the presence of an attesting witness, is itself a "promissory note," within the fourth section of the Rev. Sts. *c.* 120, and an action thereon is not barred by the statute of limitations.

But if the original note was without consideration, or the consideration thereof had failed, and there was no new consideration for such memorandum, (or new note,) the payee cannot recover thereon.

A note given for a premium of insurance cannot be recovered, if the vessel insured were unseaworthy at the time when the risk would have commenced.

Assumpsit for money had and received. At the trial in the court of common pleas, before *Ward*, C. J., the plaintiffs gave in evidence the defendant's promissory note, dated September 24th, 1824, on the margin of which the defendant wrote and signed these words, in the presence of an attesting witness: "November 4th, 1831. For value received, I hereby acknowledge this note to be due, and promise to pay the same on demand." The judge instructed the jury, that this last promise

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took the note out of the operation of the statute of limitations. The defendant offered to prove that there was no consideration for this last promise, except the note of September 24th, 1824, and that the latter was given for a premium on a policy of insurance underwritten by the plaintiffs, on the schooner New Orleans, that was unseaworthy during the whole time she was insured, and that the policy therefore never attached, and so the original note was without consideration. He also offered to prove further, that the plaintiffs refused to pay a loss caused by the perils insured against, because said schooner was unseaworthy. But the judge instructed the jury that the defendant could not give these facts, or either of them, in evidence in this action. To these instructions the defendant excepted.

Washburn, for the defendant.

Cruft, for the plaintiffs.

SHAW, C. J. The only question is, whether this action is barred by the statute of limitations, or whether it is within the exception of attested notes. There is a slight difference in phraseology between the *St.* 1786, *c.* 52, § 5, and the Rev. Sts. *c.* 120, § 4. In the former it is thus, "This act shall not extend to bar any action upon any note, in writing, signed by any person and attested by one or more witnesses, whereby such person shall promise to pay any sum of money, mentioned in such note," &c. In the revised statutes, the provision stands thus, "None of the foregoing provisions shall apply to any action brought upon a promissory note, which is signed in presence of an attesting witness."

It does not appear to have been the intention of the legislature to change the law on this subject, but to express the same rule, in shorter and more perspicuous terms. We think therefore the term "promissory note," in the revised statutes, expounded in reference to the provisions for which it was substituted, is not to be limited strictly to negotiable notes, but was intended to apply to any note in writing by which one promises to pay money to another. It is not a true test therefore to inquire, whether the promise constitutes a negotiable note. With this view of the construction

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of the statute, the court are of opinion that the memorandum of November 4, 1831, is a promissory note within the statute. It is made on good consideration, viz. the payment of an existing note, then near being barred, and purports to be for value received. It is a promise to pay a sum of money on demand. The sum and the name of the payee are not expressed in words; but they are expressed with equal exactness and certainty by reference to the note on the same paper. *Grinnell* v. *Baxter*, 17 Pick. 386. It is a new promise, in writing, on a good consideration, to pay a certain sum of money to a certain company on demand, and signed in presence of an attesting witness. It is a note, on which, if properly set out in a declaration, an action would lie. This case is quite distinguishable from that of *Gray* v. *Bowden*, recently decided in Essex. There were no promissory words, in the memorandum in that case, constituting it a new substantive contract; but only words of acknowledgment, admitting that the old note was due and unpaid.

But there was another exception taken to the decision of the court of common pleas, which deserves consideration. It appears, by the bill of exceptions, that the defendant offered to prove, that there was no consideration for the memorandum of 4th November, 1831, but the note of 24th September, 1824; that the latter was given for a premium of insurance, on the schooner New Orleans; that the schooner was unseaworthy, so that the risk never attached, and that the plaintiffs had refused to pay a loss which accrued by some of the perils insured against, because the schooner was unseaworthy. The court are of opinion that this evidence ought to have been received, and that the facts, if proved, would have constituted a good defence. It is a well established rule of the law of insurance, that if the vessel is unseaworthy at the time the risk would commence, the policy does not attach, and no premium is due; and if a premium note has been given, the consideration fails, and it cannot be recovered. *Russell* v. *De Grand*, 15 Mass. 35. *Taylor* v. *Lowell*, 3 Mass. 331. *Merchants' Insurance Company* v. *Clapp*, 11 Pick. 56 The note in suit, being but a continuance or renewal of the premium note, the same defence which would be good against the

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original note, may be made to this. If the consideration of that failed, there is no legal consideration for this.

Exception sustained, and the verdict in the court of common pleas is set aside, and new trial to be had at the bar of that court.

CHARLES BENT & another *vs.* ROLUN HARTSHORN.

A writing in these words, "I agree to be responsible for the price of goods purchased of you, either by note or account, by H. H. at any time hereafter, to the amount of $ 1000," is a continuing guaranty, to that extent, for goods to be at any time sold to H. H. before the credit is recalled.

ASSUMPSIT on this guaranty, viz. "Boston, June 21st, 1833. Messrs. Bent & Bush. I hereby agree to be responsible for the price of hats and other goods purchased of you, either by note or account, by H. Hartshorn at any time hereafter, to an amount not exceeding one thousand dollars. Rolun Hartshorn."

The parties submitted the case to the court on the following facts: "In 1833, Harvey Hartshorn, brother of the defendant, wished to obtain credit of the plaintiffs to enable him to carry on business. The defendant, to enable his said brother to obtain, and to induce the plaintiffs to give, such credit, signed and delivered to them the above letter. The plaintiffs accepted the same, (of which the defendant had notice,) and proceeded to sell hats and other goods to said H. Hartshorn, to a considerable amount He made sundry payments to the plaintiffs, on account of the goods so sold to him, to the amount of more than $ 1000, which were credited to his account, generally; but there is still due from him to the plaintiffs, and constantly has been, ever since about the time when he commenced dealing with them, more than $ 1000 for goods sold and delivered. H. Hartshorn died in January, 1837, and his estate is insolvent. Payment of $ 1000 was demanded and refused before action brought.

"The plaintiffs insist that the guaranty is a continuing one, and that, as no notice was given them by the defendant, that he revoked the same, or would not be bound thereby, they are entitled to recover $ 1000. The defendant contends, that said letter is

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not a continuing guaranty; but that said H. Hartshorn, having purchased goods of the plaintiffs to the amount therein mentioned, and paid them, on account, a sum equal to that amount, the defendant's obligation on the guaranty was thereby discharged. And this is the only question between the parties.

"The defendant is to be defaulted, or the plaintiffs to be non suit, as the court shall decide this question."

B. Rand, for the plaintiffs, cited *Bastow* v. *Bennett*, 3 Campb 220. *Clark* v. *Burdett*, 2 Hall, 197. *Nicholson* v. *Paget*, 1 Crompt. & Mees. 48. *Allan* v. *Kenning*, 9 Bing. 618, and the cases referred to in the opinion of the court.

Crowninshield, for the defendant, cited *Melville* v. *Hayden*, 3 Barn. & Ald. 593. *Cremer* v. *Higginson*, 1 Mason, 336. *Rogers* v. *Warner*, 8 Johns. 119. *Bovill* v. *Turner*, 2 Chit. R. 205. *Kirby* v. *Duke of Marlborough*, 2 M. & S. 18. *Aldricks* v. *Higgins*, 16 S. & R. 212.

Shaw, C. J. The question upon the facts stated is whether the undertaking by the defendant, in behalf of his brother, was a continuing guaranty, or whether it was at an end when the plaintiffs had once sold goods to Harvey Hartshorn, to the amount of one thousand dollars.

In cases of this description, not much aid can be derived from decided cases, because each case must depend mainly upon the terms of the instrument, and it is scarcely possible that one instrument should be in precisely the same terms as another. The rule, as in other cases, must be to look at the whole instrument, and the circumstances and relations in which the parties stand to each other, at the time of entering into the contract, and therefrom to ascertain the intent of the parties; and the intent, when thus ascertained, must govern the construction of the contract. The principle to be extracted from numerous decided cases, we think is this; that when by the terms of the undertaking, by the recitals in the instrument, or by a reference to the custom and course of dealing between the parties, it appears that the guaranty looked to a future course of dealing for an indefinite time, or a succession of credits to be given, it is to be deemed a continuing guaranty, and the amount expressed is to limit the

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amount for which the guarantor is to be responsible, and not the amount to which the dealing or whole credit given is to extend *Mason* v. *Pritchard*, 12 East, 227. *Merle* v. *Wells*, 2 Campb 413. *Douglass* v. *Reynolds*, 7 Pet. 113. *Simpson* v. *Manley*, 2 Tyrw. 86. *Hargreave* v. *Smee*, 6 Bing. 244. In the present case, the defendant agrees with the plaintiffs to be responsible for the price of hats and other goods purchased either by note or account by Harvey Hartshorn at any time thereafter, not exceeding in all the sum of $1000. The words *at any time hereafter*, leave it indefinite as to time, and it must continue at least until the guarantor gives notice that he will be no longer liable. The limitation of $1000 is not a limit of the amount to be purchased of the plaintiffs, but of the amount of the guarantor's responsibility. Thus construed, it is an undertaking to guaranty the payment for any goods, to be afterwards purchased, provided only that such responsibility as guarantor should not exceed in all $1000. Thus construed, it is clearly a case of continuing guaranty, and therefore, although the first $1000 worth of goods purchased were paid for by the purchaser, yet the guaranty extended to other goods subsequently taken up and not paid for, when the principal died insolvent; and the opinion of the court is that the plaintiffs are entitled to recover.

Defendant defaulted.

GEORGE CARLISLE & wife *vs.* EZRA WESTON.

A declaration, in trespass *de bonis asportatis*, is ill, even after verdict, if it do not aver the plaintiff's title to the goods.

When judgment is arrested after verdict, and leave to amend and a new trial are granted, costs are allowed to the defendant from the time the case went to the jury.

TRESPASS *de bonis asportatis*. There was no averment in the declaration that the goods were the property of the plaintiffs, or that they had any possession, or right of possession, at the time of the taking. After verdict for the plaintiffs, *Brigham* filed a motion in arrest of judgment, and cited Com.

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Dig. Pleader, 3 M. 9. Gould Pl. 503. *Franklyn* v. *Reeves*, Rep. Temp. Hardw. 118.

B. Sumner, for the plaintiffs, asked leave to amend, without terms, if the court should decide that the defect in the declaration was not cured by the verdict.

Brigham asked for costs, if the plaintiffs should amend, and cited *Williams* v. *Hingham, &c. Turnpike Corporation*, 4 Pick. 341.

Shaw, C. J. The declaration is fatally defective in not stating the plaintiffs' title, and judgment must be arrested. The court have no means of knowing, from the minutes of the judge who tried the case, or otherwise, that the plaintiffs' property in the goods was proved; and not being stated in the declaration, it is not to be presumed. It is not the case of a title defectively stated, which may be cured by a verdict; but the plaintiffs have stated no title. No judgment can be rendered on the declaration as it stands; but the plaintiffs may, upon paying the costs which have accrued since the case went to the jury, have a new trial.

Whether, if the court had judicial knowledge that the property was proved to have been the plaintiffs', they might grant leave to amend, and enter judgment on the verdict, as upon the amended declaration, is a point that need not be decided at this time.

David Miller *vs.* John Baker 2d.

Where, at the first trial of a cause, a party sets up a conveyance as a mortgage, and it is decided that such conveyance is absolute, he is not estopped to rely on it as absolute, at a second trial.

Trespass *de bonis asportatis* is maintained by proof that the defendant unlawfully exercised an authority over the chattels, against the will and to the exclusion of the owner, though there was no manual taking or removal.

Trees and shrubs, in land demised to be used as a nursery garden, are personal chattels, as between the lessor and the lessee and his assigns, and may be severed and removed.

Trespass against the sheriff of Norfolk for taking, by one of his deputies, nursery trees, shrubs, and plants, and converting

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them to his own use. On the trial of the general issue, before *Wilde*, J., the plaintiff claimed title to this property under an instrument executed by Charles Senior, dated October 3d, 1834; and he proved actual delivery, and his possession thereof. The land, in which said trees, &c. were growing, had been demised to Senior, to be occupied for the purpose of a nursery garden, &c. At a former trial of this action, (20 Pick. 285,) said instrument was produced by the plaintiff as a mortgage, and shown to have been recorded in the office of the clerk of the town of Roxbury. The judge who presided at that trial ruled that it was a mortgage; but the whole court, on a reservation of the question at the defendant's motion, decided otherwise. At the last trial, the defendant insisted that the plaintiff was estopped by his former course of proceeding, to set up the instrument as an absolute sale; but the judge ruled that the plaintiff was not thus estopped.

It was proved that a writ in favor of Sumner & Williams against Senior was put into the hands of a deputy of the defendant, who returned that he had attached the property in question. It was also testified by the person appointed, by said deputy, keeper of said property, that he was directed to keep all the property in the green-house and garden, and not to permit any one to remove it, and that he did keep the same thirteen days, and then delivered it to the attaching creditors of Senior, by order of the deputy sheriff who served the writ.

The judge ruled that this was *primâ facie* evidence of a taking and conversion; to which ruling the defendant excepted. A portion of the shrubs and plants in question were proved to have been in pots, boxes, &c. in a green-house, and others, like the nursery trees, rooted or inserted in the soil. The question was reserved whether damages for taking and converting trees, shrubs, and plants rooted in the soil of a nursery garden, for the purpose of being taken up and sent to market in the spring and autumn of each year, can be recovered in this form of action.

A verdict for the plaintiff was taken, so as to separate the damages given for the green-house and pot plants from those

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rooted in the soil, and is to be sustained, or set aside, wholly or in part, as the court shall order.

S. D. Parker, for the defendant. Trespass will not lie against the defendant, because there was no removal, conversion, or taking. *Albee* v. *Ward*, 8 Mass. 79. *Hayden* v. *Shed*, 11 Mass. 500. *Broughton* v. *Whallon*, 8 Wend. 474.

This action does not lie for trees, &c. inserted in the soil and not severed. They are part of the realty. *Lee* v. *Risdon*, 7 Taunt. 191. *Herlakenden's case*, 4 Co. 62. *The Queen* v. *Harris*, 11 Mod. 113, 121. *Emmerson* v. *Annison*, 1 Mod 89. 4 Bl. Com. 233.

The plaintiff was estopped to set up the conveyance to him as an absolute sale, after having relied upon it as a mortgage.

D. A. Simmons, for the plaintiff. The evidence shows that there was such an interference with the property, and such a control of it as amounts in law to a taking and conversion. *Gibbs* v. *Chase*, 10 Mass. 128.

Nursery trees are personal property. *Penton* v. *Robart*, 2 East, 90. *Wyndham* v. *Way*, 4 Taunt. 316.

The plaintiff cannot be estopped to assert his conveyance to be such as the court has decided it to be.

DEWEY, J. That trespass *de bonis asportatis* is a proper form of action where the owner of personal chattels seeks to recover against the sheriff damages for the illegal act of his deputy, in taking such chattels under color of process of law and by virtue of his office, is too well settled to admit of a question. Whether the facts here disclosed show such illegal taking of personal chattels of the plaintiff as will authorize him to recover in this action, properly opens the inquiry into all the circumstances as shown by the evidence offered in the case.

The title of the plaintiff was derived from one Charles Senior, under an instrument executed by Senior conveying to the plaintiff the property in controversy, which instrument the plaintiff contended was in its legal effect an absolute bill of sale and effectual as such to pass the property to him. The defendant on the present trial insisted that the plaintiff was estopped from setting up this instrument as an absolute sale, inasmuch as he

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had, on a former trial of the same cause, offered it as a mortgage and insisted that such was its legal effect. It is not controverted on the other side, that the plaintiff did so offer it, and did insist in the argument of the case before the full court that such was its character; but it is said that this court, after a full hearing upon that question, (20 Pick. 285,) decided that the instrument was not a mortgage but an absolute bill of sale; a decision less favorable to the plaintiff than an adjudication that it was a mortgage; as in the former case evidence of a delivery of the property was requisite, but in the latter it would be effectual to pass the property upon proof that it had been duly recorded. It is very difficult for us to perceive upon what possible ground this objection can be supposed tenable. That upon a new trial being granted for the very reason that the instrument had on the former trial been offered as a mortgage, and was so considered for the purposes of the trial, and upon its being sent to another jury with the sole view of submitting the question of the rights of the parties under such decision of the court, the party should be estopped from offering the instrument as one of precisely the character the court had decided it to be, solely because he had previously erroneously insisted upon another construction of the instrument, would seem to be carrying the doctrine of estoppels quite too far, certainly much further than either the principles of law or good sense would justify.

This instrument was therefore properly submitted to the jury as an absolute conveyance, and upon proper proof of its being made *bonâ fide* and with good consideration, and accompanied with delivery of the property, it was sufficient to authorize the jury to find that the property was legally in the plaintiff.

Nor is there any doubt that the acts done by the servant of the defendant would constitute a trespass, as to the personal chattels of the plaintiff. A forcible taking of goods is not necessary to enable the owner to maintain trespass. On a similar question in *Gibbs* v. *Chase*, 10 Mass. 128, *Sewall*, J. says, "No actual force is necessary to be proved. He who interferes with my goods, and without delivery by me, and without my consent, undertakes to dispose of them as having the property.

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general or special, does it at his peril to answer me the value in trespass or trover." It is sufficient to maintain trespass, if the party exercises an authority over the goods against the will and to the exclusion of the owner by an unlawful intermeddling, though there be no manual taking or removal. *Wintringham* v. *Lafoy*, 7 Cow. 735. *Phillips* v. *Hall*, 8 Wend. 610.

In the present case there was not only an attachment of the property, but the placing of a keeper over it with directions to permit no one to remove the same, and an entry and exclusive possession by the keeper. It seems, therefore, that as to so much of the property in controversy as is conceded to be personal chattels, the case is clearly with the plaintiff.

The question whether the fruit trees, shrubs, and plants, rooted in the soil of the nursery garden, can be properly denominated personal chattels, and as such be embraced in the present action, is attended with more difficulty. Questions as to what is personal estate and what appertains to the realty have more usually arisen in cases of conflicting claims between the heir and the executor or administrator, or between landlord and tenant, and these have been not unfrequently cases of much nicety in properly applying the principles of law. As respects the cases between landlord and tenant, the leaning of the courts in modern times has been to give a rather liberal construction in favor of the right of the tenant to remove property placed by him upon the land.

Taking the question restricted to the case before us, it seems to us that the plaintiff is entitled to retain his verdict for the entire damages found by the jury, as well for the plants and trees rooted in the soil, as for the green-house and pot plants. The plaintiff acquired by his bill of sale the interest of Senior in the fruit trees, shrubs, and plants rooted in the soil, to the same extent that he enjoyed it. What was the interest of Senior, and what were his rights, as to this species of property? He was in the occupation of the land, in the soil of which these trees and plants were growing, as a nursery garden, by the consent of the owner of the land, and occupying the land for this special object. The permission to occupy the land for a nursery garden was necessa-

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rily a permission to cultivate these productions for the purpose of sale and transfer, at pleasure, to other places. The products of this garden may, therefore, as regards the interest of Senior, be well considered to be articles of trade and sale, and the right to remove them from time to time would seem to be unquestionable. The case of a purchaser under Senior of certain fruit trees and plants, acquiring a title only to the trees and plants, and the use of soil for their nourishment, without the right of general occupation of the nursery grounds for a nursery, may present perhaps a still clearer case of personal chattels.

Whether such articles might be lawfully taken on attachment against the owner, and removed by the attaching officer, is a question we do not decide. Difficulties may arise in the exercise of this power, from the peculiar nature of the property and the injury which might result, if they were removed at an improper season, or kept from the earth an unsuitable length of time. Whether they might be attached, without an actual seizure and taking possession, being considered as falling within a class of personal property that cannot easily be removed, (as buildings erected on the land of another,) may also be a subject for consideration in some future case.

The plaintiff had the right of removal of these products; they were to him articles of trade and merchandize, and the right to cultivate them, for the purpose of removal, was the extent of his interest in the nursery garden; and having this species of property, and this restricted interest in the soil, we think he may be allowed to treat them as personal chattels, and to recover their value as against a wrongdoer who should be guilty of a conversion of them, by taking them into his possession and excluding the owner from the lawful exercise of his rights over them. The reported cases to which we were referred by the counsel, do not furnish any direct adjudication upon the point we have been considering.

In the case of *Penton* v. *Robart*, 2 East, 88, where the immediate question was the right of the tenant to take down and remove certain buildings erected by him on the demised premises, Lord *Kenyon*, in delivering his opinion, seems to counte-

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nance the view we have taken of this subject. In commenting upon the rule as to fixtures, he asks, "Shall it be said that the great gardeners and nurserymen in the neighbourhood of London, who expend thousands of pounds in the erection of greenhouses and hothouses, &c., are obliged to leave all these things on the premises, when it is notorious that they are even permitted to remove trees, or such as are likely to become such, by the thousand, in the necessary course of their trade. If it were otherwise, the very object of their holding would be defeated. This is a description of property divided from the realty."

In *Wyndham* v. *Way*, 4 Taunt. 316, *Heath*, J. suggests the same view as to the right of a tenant, who is a nurseryman by trade, to remove fruit trees. Indeed this right, I suppose, can hardly be questioned; but the doubt, if any, arises as to the nature of this property while the trees and shrubs are connected with the soil, and before removal. Upon this latter point, it is proper to remark that *Gibbs*, C. J., in *Lee* v. *Risdon* 7 Taunt. 191, in discussing the more general question of fixtures, says that trees in a nursery ground are a part of the freehold until severed. And no doubt this is true as between the heir and executor, and would be so also where the entire property in the land and in the trees growing thereon is united in the same person. But we apprehend, in a case like the present, where the owner of the trees had no permanent interest in the soil, but was, at most, using it for the mere purpose of nourishing and sustaining his trees until the proper period should arrive for their removal, the interest in the trees may be considered as separated from the realty, and they may well be denominated personal chattels, and for the wrongful taking and conversion of them by a stranger, the owner may maintain an action of trespass *de bonis asportatis*.

Judgment on the verdict.

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New Hampshire Savings Bank *vs.* Benjamin F. Varnum.

Where a debtor and his attaching creditors agree in writing that the attached goods may be sold, by the deputy sheriff who attached them, either at public or private sale, at his discretion, and that the proceeds shall be held to respond the judgments, which may be rendered against the debtor, according to the Revised Statutes, and the deputy sells the goods, partly at private and partly at public sale, and receives the money therefor, but neglects to apply it in satisfaction of executions, issued on judgments recovered by such creditors, and seasonably put into his hands, the sheriff is answerable for such default of his deputy.

This was an action against the sheriff of Middlesex for the default of his deputy, John Kimball, in not serving and returning an execution in favor of the plaintiffs against H. W. Hastings. It appeared, on the trial before *Wilde*, J. that, in November, 1836, Kimball attached, on a writ sued out by the plaintiffs against said Hastings, a stock of goods, subject to four prior attachments; that the plaintiffs and the prior attaching creditors, severally recovered judgment against Hastings, took out executions and delivered them, within thirty days, to Kimball; and that the judgments of the three first of those creditors, amounting, in the whole, to $1711, were satisfied from the proceeds of the sale, by him, of the goods attached. The fourth attaching creditor directed said Kimball to give priority to the plaintiffs' execution, and treat their attachment as if it had been the fourth instead of the fifth. Kimball caused the plaintiffs' execution to be satisfied for the sum of $352·77 only, and did not return it, nor pay the balance due thereon.

While the actions of the several attaching creditors of Hastings were pending, viz. on the 2d of February, 1837, he and they signed a writing, consenting that the goods attached by Kimball, on their respective writs, should be sold by him within one month, "at public or private sale, at his discretion," and that the proceeds thereof should be held to respond the judgments which might be rendered against said Hastings, "according to the revised statutes, *c.* 90, § 57." It was not proved that the defendant had any knowledge of this agreement, at the time it was made.

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Kimball sold, at private sale, between February 9th and March 26th, 1837, a portion of the attached goods, amounting to $ 2964, leaving unsold goods estimated at $ 1068, which was their original cost. These he afterwards sold at public auction, but it did not appear for what sum, except that the defendant admitted that it was between seven and eight hundred dollars. The money for which the goods were sold was all received by said Kimball.

It was insisted by the defendant's counsel, that the above agreement between Hastings and his attaching creditors, and the acts of Kimball under it, discharged the defendant from all liability for his deputy's doings in reference to said goods. The judge ruled otherwise, and a verdict was returned for the plaintiffs. The defendant moved for a new trial.

Choate, for the defendant. The creditors of Hastings made Kimball their special agent to satisfy their executions by means not conferred on him by law, and the sheriff is not answerable for Kimball's misconduct. *Marshall* v. *Hosmer*, 4 Mass. 63, 64. *Bond* v. *Ward*, 7 Mass. 127, 128. *Gorham* v. *Gale*, 6 Cow. 467, *note*. 7 Cow. 739. 15 Wend. 579, 580. *Samuel* v *Commonwealth*, 6 Monr. 174. *Bowmaker* v. *Moore*, 7 Price, 231. Theobald on Prin. & Surety, 118. 154. *United States* v. *Moore*, 2 Brock. 317.

H. H. Fuller and *F. Smith*, for the plaintiffs, cited *Kingsbury* v. *Baker*, 17 Pick. 429. *Knowlton* v. *Bartlett*, 1 Pick. 271. *Tuttle* v. *Cook*, 15 Wend. 274. *Walden* v. *Davison*, 15 Wend. 575. *Armstrong* v. *Garrow*, 6 Cow. 465. *Sanderson* v. *Baker*, 2 W. Bl. 832.

PUTNAM, J. It is provided in the Rev. Sts. *c*. 90, § 57, that "when any personal property is attached, whether on one or more writs, and the debtor and all the attaching creditors shall consent in writing to the sale thereof, the attaching officer shall sell the same in the manner prescribed by law for selling the like property on execution; and the proceeds of the sale, after deducting the necessary charges thereof, shall be held by the officer subject to the attachment or attachments, and shall be disposed of in like manner as the said property would have been

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held and disposed of, if it had remained unsold." By the same statutes, c. 97, § 23, the sale of goods seized on execution is to be made by *public auction*. But in the case at bar, all the attaching creditors and the debtor agreed, in writing, that the personal property of the debtor, which was then held by the deputy sheriff under attachment, should be sold by him within a month from the date of the agreement at public or *private* sale, at his discretion, and that the *proceeds* thereof should be held to respond the judgment which should be rendered against the debtor, according to the Rev. Sts. c. 90, § 57, before cited.

Part of the goods were sold at auction, by Kimball, the defendant's deputy, and part by private sale, pursuant to that agreement, and the proceeds came to his hands. He refuses to apply the proceeds of the sale to the satisfaction of the plaintiffs' execution, and the sheriff defends, because the deputy did not make the sale of all the goods at auction, as the law would have required him to do, if he had seized and sold them upon execution. And the question is, whether that is a sufficient answer to the plaintiffs' claim.

It has been argued for the defendant, that he is answerable only for acts or omissions *colore officii*, and that his deputy has, in the case at bar, acted as the agent of the attaching creditors and of the debtor, and not as the servant of the sheriff. And we agree to the rule derived from the cases cited, that the sheriff is answerable only for breaches of duty enjoined by the law upon his deputy. Thus, in the case of *United States* v. *Moore*, 2 Brock. 317, the marshal was held not to be liable for his deputy who undertook to receive the debt, and to discharge it, on a writ of *capias ad respondendum*. He had no authority from the creditor or from the writ to do any such thing. And in *Gorham* v. *Gale*, 7 Cow. 739, and *Armstrong* v. *Garrow*, 6 Cow. 465, "if the deputy takes a course, in the collection of the execution, out of the line required by the law, as by giving credit, &c., in consequence of the plaintiff's interference, the sheriff will be discharged." This is right. Wherever the deputy departs from the line of his official duty, by the desire or authority of the plaintiff himself, the sheriff is not to be charged; but where

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there has been an unwarrantable departure, the sheriff is to be held liable.

We must distinguish between the defaults of the deputy, when acting under the authority of the plaintiffs, and when acting in his official character. It must be conceded, we think, that Kimball acted as the agent of the debtor and creditors in disposing of the goods at private sale; and if any loss had arisen from his manner of effecting that sale, it must have been borne by them. If, for example, he had sold upon a credit, and the purchaser had failed, the sheriff would not have been liable, inasmuch as Kimball did not, in that matter, act in his official character, as the servant of the sheriff, but as the agent of the plaintiffs and others, in virtue of their special authority.

But there is no complaint against the agent in regard to his conduct in making the sale. No suggestion is made that he did not exercise a sound discretion, or that the goods were not sold for a full price. The complaint is, that the deputy of the sheriff refuses to pay the money to the plaintiffs in satisfaction of their execution.

Now the proceeds of the goods, which were attached and sold, represent the goods themselves. They were to be held by the deputy, according to the agreement in the case, to respond the judgment which might be rendered against Hastings, the debtor, according to the Rev. Sts. c. 90, § 57. They were to be held by the officer, subject to the attachment or attachments, and should be disposed of in like manner as the property would have been held and disposed of, if it had remained unsold. The plaintiffs' execution was purchased and put into the hands of the deputy, within the time prescribed by the law. It seems to us, that under these circumstances he must be deemed to have the proceeds in his hands, as an officer, and that he was bound by his official duty to apply the same to satisfy the executions in his hands. And his conduct, in regard to the payment of three of the executions, shows his own just estimate of his duty. He has certainly dealt with the proceeds in that respect officially, just as he would have dealt with the goods. And he has enough of the proceeds in his hands, where

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with to satisfy the balance which is due on the plaintiffs' execution. Indeed, sufficient property was sold at auction to satisfy the plaintiffs' balance. It seems to us, therefore, to be no defence for the sheriff, that his deputy was the agent of the creditors and of the debtor, in the *sale* of the goods, inasmuch as by the consent and agreement of all concerned, the proceeds came into his hands, to be held and appropriated by him in discharge of the executions against the debtor.

Suppose the creditors had consented to dissolve the attachments, in the belief that the debtor himself would pay the executions, whenever they should be put into the hands of the officer; and that the debtor had paid the money to the officer accordingly. In such case, there would be no ground to deny that the sheriff would be liable, because the attachments had been dissolved. Suppose that the debtor, to avoid the publicity of a sale at auction, had delivered a horse or other chattel to the officer, with directions to sell the same at private sale, and with the proceeds to pay the execution. It would seem clear, that the officer would be bound so to apply the proceeds. It would seem to be very immaterial, by what honest means the debtor was enabled to put the funds into the hands of the officer to discharge the executions. If the debtor should have given him a bill of exchange or negotiable note indorsed, to be by him collected and the proceeds to be paid in discharge of the execution, although the sheriff would not be answerable for any loss, occasioned by his deputy in the manner of collecting, or in the performing of his agency for the debtor, yet if sufficient proceeds actually came into the hands of the deputy, and he refused to return the execution satisfied, we do not perceive any good or legal reason, why the sheriff should not in such case be held responsible for such default.

For these reasons, we all think that judgment must be rendered for the plaintiff according to the verdict.

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Samuel Whitwell & others *vs.* Samuel M. Burnside.

A subsequent attaching creditor, on being admitted by the court of common pleas, under *St.* of 1823, *c.* 142, to defend an action brought by a prior attaching creditor, filed a bond for the payment of all such costs and damages as *said court* should adjudge and decree to have been occasioned by such defence to be so made. The action was afterwards brought, by appeal, into this court, where defence was made but did not prevail. Judgment was thereupon rendered against the defendant for the plaintiffs' full demand and for costs, and execution was sued out thereon and returned satisfied in part only, the defendant being insolvent. No adjudication respecting costs, &c. was made by the court of common pleas.

Held, that the plaintiff's only remedy was by suit on the bond, after an adjudication, as to costs and damages, by the court of common pleas; and that he had waived this remedy by taking his said judgment against the original defendant.

This was a petition, praying the court to pass a decree that the respondent pay to the petitioners the costs and damages sustained by them by reason of his unsuccessful defence of an action brought and prosecuted by them against David T. Brigham.

It appeared that the petitioners sued out a writ against said Brigham, returnable at the April term, 1836, of the court of common pleas in this county, on which his property was attached, that said writ was duly returned, and that the action was entered at said term, and continued to the succeeding July term of said court; that at said July term, said Brigham agreed with the petitioners, in writing, that he would be defaulted at the succeeding October term of that court, and that upon his default judgment should be entered against him for such principal sum and interest as should then be due from him to the petitioners. It also appeared that at the same July term, the respondent, being a subsequent attaching creditor of said Brigham, was admitted by said court, on his petition for that purpose duly filed, to defend the petitioners' said action, and thereupon gave bond, with sureties, pursuant to the statute of 1823, *c.* 142, to pay to the petitioners "such costs and damages as the court aforesaid" should "adjudge and decree to have been occasioned to" the petitioners "by such defence so to be made" by the respondent: That said action was continued to said October term, and was then brought to this court by appeal; and that

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after a hearing by the full court, judgment was rendered at March term 1837, in favor of the petitioners, and an execution issued and was levied on all the property of said Brigham upon which it could be levied, and was returned unsatisfied for a large amount. The petitioners also averred that said Brigham was wholly insolvent. The records of the petitioners' said action against Brigham were made part of this case.

B. R. Curtis, for the petitioners. As the provisions of the Rev. Sts. on this subject are prospective only, the basis of this claim is the statute of 1823, c. 142. The fifth section of that statute recognizes the right of an intervening creditor to appeal or bring a writ of error. The third section directs that he shall give bond, &c. "as the court shall order," to pay such costs, &c. as the court shall adjudge and decree, — meaning the court in which final judgment shall be rendered. Most of the costs, in this case, were incurred in this court, and the common pleas should not be the ultimate tribunal in this matter.

If there be any doubt in this case, it arises from the terms of the condition of the bond. The declared object of the bond is to secure all the damages and costs in both courts; and though it mentions the court of common pleas only, it should not be so limited as to exclude the costs in this court. The court may construe it to refer to the proper court. *Arnold* v. *Allen*, 8 Mass. 147. *Coolidge* v. *Inglee*, 15 Mass. 66.

It will be objected, that there is no breach of the condition of the bond until the common pleas have assessed the costs and damages. We ask this court to tax the costs, &c., and certify them to that court, so that they may be there adjudged and decreed to be paid.

But an action on the bond is not the necessary remedy of the obligees. It is only collateral security; and they may ask any proper court to ascertain the damages and costs, and then debt will lie to recover them, they being equitably due to the petitioners, and the statute recognizing their equitable right to recover them. *Storer* v. *Storer*, 6 Mass. 390. *Bigelow* v. *Cambridge & Concord Turnpike*, 7 Mass. 202. *Jeffrey* v. *Blue Hill Turnpike*, 10 Mass. 368. In confirmation of this view of

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the matter, it is to be considered that the damages may be greater than the penalty in the bond, and therefore another remedy should be open to the petitioners.

The petitioners will remit the costs taxed against Brigham, if it shall be held necessary in order to maintain their claim therefor upon the respondent.

B. Sumner and *C. Mason*, for the respondent. The petitioners have recovered their full debt and costs against Brigham, and should not have pay twice, nor the means of enforcing it twice. The injury, if any, was sustained when they recovered judgment; and the sound construction of the statute seems to be, that the court shall settle the matter of costs, &c. between the plaintiff and the contesting creditor, before judgment is entered against the defendant. If so, then there has been and can be no breach of the condition of the bond. The statute mentions only "the court whereto the writ is returnable," and makes no provision for the action of any other court on the subject of damages and costs. The petitioners should have taken care to cause the respondent to secure damages and costs in the statute mode. He was not a party to the record, and execution could not have been awarded against him The petitioners are confined to their remedy on the bond w[illegible] the court of common pleas ordered to be taken. A summary proceeding, like this, will not be adopted by this court. *Field* v. *First Massachusetts Turnpike*, 5 Mass. 389. The note appended to the Rev. Sts. c. 90, by the commissioners, shows that the provisions of the statute of 1823 were wholly insufficient. Hence the provisions introduced into those statutes.

This court has no authority to assess the damages and costs, and therefore an action of debt would not lie on its decree or adjudication, if one should be made. A specific remedy, by bond or recognizance, was given by the statute; and this distinguishes the case from those which have been cited, where a decree or judgment was rightly made, and an action of debt thereon supported.

Dewey, J. It appears that the judgment recovered by the petitioners against Brigham, at the March term, 1837, was for the

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entire amount of principal and accruing interest on the demand against him, computed to the time of the judgment, and also for all taxable costs to that time. It further appears, that no adjudication for any costs or damages, to be paid by the respondent, was made at or before the time of rendering final judgment and issuing execution against Brigham, nor at any subsequent time.

The remedy is sought for, in the present case, under the statute of 1823, c. 142. This statute was obviously very imperfect in its provisions, and somewhat difficult in its execution, as respects the various interests to be affected, and has since been superseded by the more full and explicit provisions of the Rev. Sts. c. 90, §§ 83 – 94.

It has been objected, that the amount for which an attaching creditor, who comes in to defend, is to be held to pay, must be established by an adjudication, either preceding or concurrent with the entering up of judgment against the principal debtor. It is not necessary to express any opinion as to this objection, as we think there are other objections fatal to the prayer of the petition.

The foundation of this proceeding, and the only ground for an adjudication against the respondent, is a bond executed by him, and filed in the court of common pleas, at the time he was permitted to assume, as a subsequent attaching creditor, the defence of the petitioners' action against Brigham. And it is supposed by the petitioners, that this bond authorizes an action against the respondent to recover such costs and damages as this court shall now decree to have been occasioned to the petitioners by the said defence to that action by the respondent. But upon examination of that bond, it seems to us fatally defective as the foundation of any action, or any judgment by this court upon the subject submitted to us. The condition of the bond is for the payment of all such costs and damages as the *court of common pleas* shall adjudge and decree to have been occasioned, &c. We cannot extend the obligation of the respondent and his sureties beyond the plain and direct terms of the bond. Nor would such adjudication as is prayed for be the foundation of an action of debt, or proceeding by *scire facias*, as the statute remedy is clearly by suit on the bond

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It also seems to us that this claim for costs and damages, occasioned by the delay arising from the defence of an action by a subsequent attaching creditor, should not be enforced against the principal debtor and also against such attaching creditor. The liability of the attaching creditor, who defends a suit brought by another creditor, is not like that of bail, who are held on *scire facias*, in case of the default of their principal, to pay what the debtor should have paid; but is rather an original liability, if the judgment creditor elects to rely upon his liability.

In the present instance, the judgment creditors entered up their judgment, and took out execution thereon for all those costs and damages which they now seek to have awarded against the respondent, and by so doing waived their claim, if any existed, upon the attaching creditor. Nor can the objection be obviated by releasing so much of the judgment against the debtor as is now demanded of the respondent. Such a release would not be effectual to revive the claim against the subsequent attaching creditor. Nor does the objection of the inability of the debtor in the original suit to pay the judgment recovered against him, vary the legal rights of the parties; the election having been once made, cannot now be waived, and the judgment creditors thereby reinstated in their right to ask a judgment against the respondent.

Petition dismissed.

James N. Staples & another *vs.* President, Directors, &c. of the Franklin Bank.

The maker of a promissory note is bound to pay it, upon demand made at any seasonable hour of the last day of grace, and may be sued on that day, if he fail to pay on such demand.

Post notes, issued by a bank, are payable on demand made at any time, on the last day of grace, after the known and usual hour of opening the bank for business, and may be put in suit on that day, if payment is refused.

This was an action on a post note for $ 2500, dated November 8th, 1836, issued by the defendants, payable in eight months,

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with interest, &c. The writ was sued out on the 11th of July, 1837, and the defendants' real estate was attached 7 minutes before 11 o'clock A. M. on that day. The defendants were defaulted. James Barker, a subsequent attaching creditor, afterwards filed his petition that the plaintiffs' attachment might be dissolved, pursuant to the provisions of the Revised Statutes, c. 90, §§ 83–91, on the ground that the sum demanded in the plaintiffs' suit was not payable when the action was commenced.

On the trial, before *Morton*, J. it was proved by a notary public, that on the 11th of July, 1837, he went, at the request of the plaintiffs, to the defendants' banking house in South Boston, and then and there, during the regular banking hours, presented the said post note to the cashier of the bank and demanded payment thereof, to which the said cashier replied that "the same will not be paid at present." It was proved that this demand was made before the commencement of this action, and that the defendants stopped payment before said 11th of July, and did not pay their bills, except a few small ones, after the 8th of July; that between the 5th and the 8th of July, the Tremont Bank refused to redeem the bills of the defendants, as it had before done; and that, from that time, those bills ceased to pass as money, or like the bills of the other banks in Boston.

The question whether the sum of money, demanded by the petitioner, J. Barker, in his action against the defendants, was payable to him at the time his action was commenced, was submitted to the jury, and they found a verdict in his favor.

If, in the opinion of the court, the plaintiffs' action was prematurely brought, then their attachment, so far as affected by the petition of Barker, is to be dissolved; otherwise said petition is to be dismissed.

Fletcher and *English*, for the petitioner. Post notes are entitled to grace; *Perkins* v. *Franklin Bank*, 21 Pick. 483; and the maker of a note, or the acceptor of a bill, has the whole of the last day of grace in which to make payment. *Jones* v. *Fales*, 4 Mass. 251. *Church* v. *Clark*, 21 Pick. 311. *Haynes* v. *Birks*, 3 Bos. & Pul. 602. *Hartley* v. *Case*, 4 Barn. & Cres. 339. *Bank of Utica* v. *Wager*, 2 Cow. 766. An ac

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tion cannot be brought on the last day of grace. *Leftley* v. *Mills*, 4 T. R. 173, per Lord *Kenyon*. *Osborn* v. *Moncure*, 3 Wend. 170. *Randolph* v. *Cook*, 2 Porter, 286. *Webb* v. *Fairmaner*, 3 Mees. & Welsb. 474.

In Byles on Bills, 131, the rule is thus laid down, viz. if payment be refused, during the last day, the holder of a bill or note may give notice of its dishonor; yet if payment be subsequently made, on that day, such notice becomes of no avail. And this is the extent of the rule, as expressed in *Farmers' Bank* v. *Duvall*, 7 Gill & Johns. 89. *Crenshaw* v. *M'Kiernan*, Minor, 295. *Bussard* v. *Levering*, 6 Wheat. 102. *Lindenberger* v. *Beall*, 6 Wheat. 104. 1 Leigh's Nisi Prius, 447.

This action was commenced before the reasonable hour. The note was by law payable only at the bank, and a demand there was necessary; but the defendants were in no fault until the close of banking hours. *Church* v. *Clark*, 21 Pick. 310.

Washburn, for the plaintiffs. A default of the maker which will charge the indorser, upon notice, gives a right of action against the maker. As notice may be given, on the maker's failing to pay, on demand, during the business hours of the third day of grace, an action may then be commenced against him. *Leftley* v. *Mills*, 4 T. R. 174, per *Buller*, J. Bayley on Bills, (2d Amer. ed.) 345. *Greeley* v. *Thurston*, 4 Greenl. 479. *Shed* v. *Brett*, 1 Pick. 401. *New England Bank* v. *Lewis*, 2 Pick. 125. *City Bank* v. *Cutter*, 3 Pick. 418. *Boston Bank* v. *Hodges*, 9 Pick. 421. *Dennie* v. *Walker*, 7 N. Hamp. 201. *Henry* v. *Jones*, 8 Mass. 453.

The demand was seasonably made and payment was refused sufficiently to render a second demand, at a later hour, unnecessary. Bayley on Bills, 261. *Ex parte Moline*, 19 Ves. 216. *Burbridge* v. *Manners*, 3 Campb. 193.

Fletcher, in reply. The weight of authority, in England, is with the petitioner. There is no adjudication there against him. *Buller*, J. founded his opinion (4 T. R. 174,) solely upon the custom to protest bills on the last day of grace. *Shed* v. *Brett* was decided on the question of notice alone. Though the writ was made on the last day of grace, yet it was not served until

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the next day, and might therefore be considered as merely provisional, so that the action was not commenced before service of the writ. *Seaver* v. *Lincoln*, 21 Pick. 267. The opinion in 4 Greenl. 479, was extrajudicial, resting on that of *Buller*, J. and on *Shed* v. *Brett*. In all other cases, a debtor has the whole day; and there is no good reason for making an exception in the case of notes and bills.

SHAW, C. J. The present question comes before the court upon the petition of a subsequent attaching creditor, to set aside and dissolve the attachment in the present suit. The Rev. Sts. *c.* 90, §§ 83–94, authorize an after attaching creditor to come in and obtain a dissolution of the prior attachment, by showing, if he can, either that the sum demanded in the first suit was not justly due, or that it was not payable when the action was commenced. The petitioner insists that his case is within the last provision of the statute; that the sum demanded in this writ was not payable when the action was commenced; and this is the question for our consideration.

The action is brought upon a bank post note issued by the defendants, dated November 8, 1836, demanded at the bank July 11, 1837, in the forenoon, after the commencement of banking hours. Payment was then refused, and an action was commenced, after the demand, the same forenoon. No tender, or offer of the amount, was made to the plaintiffs, either on the same day, or at any time afterwards.

In a recent case, it was held that the statute, giving days of grace on all promissory notes payable at a future day certain, in which there is not an express stipulation to the contrary, (Rev. Sts. *c.* 33, § 5,) applies to bank post notes, and is not controlled or affected by the usages of banks. *Perkins* v. *Franklin Bank*, 21 Pick. 483. This note being entitled to grace by the statute, the 11th of July was the last day of grace; and then the question is, whether upon a demand and refusal of payment, within banking hours on the last day of grace, a right of action immediately accrues to the holder, so that he may then commence his action; or whether he is bound to wait till the next succeeding day. It certainly struck me with some surprise,

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that such a question should now be made, thinking, as I did, that it was well settled, by the law and practice of this Commonwealth, that a promissory note was due at any time within reasonable hours, on the last day of grace, and that upon presentment to the promisor, and a demand of payment, and on a neglect or refusal to pay, the note was dishonored, and a right of action immediately accrued to the holder against the maker; and after due notice, actual or constructive, to the indorser, a like right of action, on the same day, accrued to the holder against the indorser. But as it appeared upon the argument that there is respectable authority for the contrary opinion, it becomes necessary to examine the subject with attention. Nothing is more important to a commercial community, than to have all questions relative to the rights and duties of holders, and all other parties to negotiable bills and notes, definitely settled. And it is greatly desirable, that throughout all the States of the Union, which, to many purposes, constitute one extended commercial community, the rules upon this subject should be uniform.

We will first consider the Massachusetts authorities on this subject, and then see how far they are supported or opposed by those of England or the other States.

The only question now is, whether a note is payable on demand on the last day of grace, when a note is entitled to grace. A different construction may perhaps apply, when a note is payable without grace. As grace was originally matter of indulgence and courtesy, and not of contract, it perhaps may be contended, that although a debtor has the whole of the last day of the credit stipulated for by contract to make payment, yet a different rule may apply to grace, which is not part of the contract. So when the third day of grace falls on Sunday, as the right of one or the other of the parties must yield, it shall be that of the one who claims indulgence, and not of him who claims of right; whereas if a bond were to be payable on Sunday, the debtor would have till the close of Monday, to pay it. Some of the cases appear to turn on this distinction.

Formerly it was held, in Massachusetts, that unless a promissory note expressed grace, it was payable without grace; now it

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is otherwise by statute. Whether a note, expressed to be payable in thirty days, without grace, is considered due on demand on the thirtieth day after the day of the date, it is not now necessary to decide; though we are inclined to think that such was the rule formerly, when notes were not entitled to grace.

The first case of which a report is published, and which is directly in point, is a *nisi prius* decision of Chief Justice *Parsons*, and is reported in an American edition of Chitty on Bills, (p 225, note *y*,) published in 1809, and edited by Mr. Story, now Mr. Justice Story, of the supreme court of the United States, that of *Park* v. *Page*, Suffolk, November term, 1808. He says, "the note is due on the last day of grace, and if payment is refused, the maker may be sued on that day." I have examined the record of that case, and find that it was a suit by the indorsee against the indorser of a promissory note, dated 7 July, 1807, payable at sixty days with customary grace. The last day of grace was therefore the 8th of September. The writ is dated on the 8th of September, and was served by an attachment of real estate, at 11 o'clock on that day. To this opinion at *nisi prius*, no exception appears to have been taken, and parties and counsel acquiesced. The only difference between the case thus appearing, and the note cited, is, that the action was against the indorser and not against the maker. But if an action would lie against the indorser, who is only provisionally liable on the default of the maker, *à fortiori*, as it seems, would it lie against the maker, who is the principal debtor. This edition of Chitty, by Mr. Justice Story, was extensively in use in this Commonwealth, for many years, amongst lawyers and merchants, and was regarded as high authority on the law of negotiable bills and notes.

The case of *Henry* v. *Jones*, 8 Mass. 453, decided in 1812, appears to me to have a strong application to the point in question. It was a suit against an indorser, on a note dated March 4th, 1809, payable in sixty days; and as the law then stood, was not entitled to grace. The question was, whether the day of the date should be excluded from the computation of the sixty days; if it should be, the note was at maturity on the 3d of May; if included, it was on the 2d. The note was presented to the

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maker on the 2d, and payment refused, and notice was given to the indorser at a very early hour on the morning of the 3d, and payment not being made, a suit was then commenced. The court held that the day of the date should be excluded, and from there being no grace, the 3d of May was the last day of the sixty days' credit stipulated for, by the contract. The court, in concluding their judgment say; "No action lies against the indorser, until after demand made *on* the day of the maturity of the note. In this case the demand was made on the day preceding, and not on the day fixed by the parties for the payment." Here, it will be perceived, the rule was prescribed, as well when the note was payable without grace, as when it is with grace; and it is payable on demand, on the last of the days specified in the note. Otherwise, the note in question would not have been demandable till the 4th.

This case is recognized and confirmed, as to a demand on the day of maturity, in *Farnum* v. *Fowle*, 12 Mass. 89.

But the case in which the point was directly decided, and a case which received great consideration, is that of *Shed* v. *Brett*, 1 Pick. 401. Several other questions were considered, and the case underwent great discussion. The action was commenced against the indorser, on the last day of grace, after a demand on the promisor, and notice put in the post-office for the indorser, who lived in another town, and held well to lie. The point, that all parties are in default, and liable to an action on the last day of grace, after demand and refusal to pay, seems rather to have been taken as a well settled rule, than an open question. The court, in giving judgment, say that the right of action accrues against the indorser of a note, when the maker refuses to pay.

The case of *N. E. Bank* v. *Lewis*, 2 Pick. 125, goes on the same ground. The action was against the indorser, and commenced on the last day of grace, and it was conceded that if the notice had been given to the indorser before the service of the writ, which might have been done in a few minutes, the action might have been sustained. The case was decided on a distinction between the case where the parties live in the same

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and in different towns. In the latter case, putting a letter in the post-office is held sufficient constructive notice, although it cannot by possibility have reached the indorser by the course of the mail. And the point in this case was, that if the notice precedes the suit ever so short a time, as if the officer go with the notice in one hand, and the writ in the other, it will be sufficient. This is an express declaration, that an action will lie after a default on the last day of grace.

The case of *City Bank* v. *Cutter*, 3 Pick. 414, is quite decisive of the same point. In that case, which was against an indorser, the defendants pleaded a tender on the day after the last day of grace. If the promisor and indorser had to the last hour of the last day of grace to make payment, there was no default till the day after; and as there can be no fraction of a day in such case, a tender on that day would be a complete performance of the contract, and a good bar to the action. The court in overruling the plea, say, "Our doctrine, as established in the case of *Shed* v. *Brett*, and indeed always practically recognized, is, that the suit may be brought on the very day the note becomes due, after demand and notice, for there is then a breach of the promise. If the note is not paid during the business hours of the day, if the money is to be paid into a bank, a right of action has accrued."

The same doctine is recognized and declared in *Boston Bank* v. *Hodges*, 9 Pick. 420. The court, on dealing with an argument of the plaintiff, that the note being due on the 9th of May, the last day of grace, a demand and refusal to pay on any part of that day, with immediate notice to the indorser, will give a right of action against the latter, say; "This is true, when there is an actual demand upon the maker according to the general rule of law." But the case was decided against the plaintiffs, on the ground that they had neither conformed to the general rule of law, nor to the substituted course established by their own usage.

The principle I am stating was again recognized in *Church* v. *Clark*, 21 Pick. 310. The note was made payable at a bank, and the suit was commenced against the maker at one minute after 12 o'clock at night, being the morning of the last

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day of grace. Held that it would not lie. The court again repeat the general rule, that a note is payable at any time on demand on the last day of grace, or day it becomes due. But such a rule may be modified by the terms of the note; and making a note payable at a bank, is making it payable within usual banking hours.

From this view of the cases decided in Massachusetts, it seems to have been uniformly held, that on demand and refusal of payment, by the maker, at any reasonable time on the last day of grace, the note is due and payable; that if not then paid an action may be immediately commenced against the maker, and after actual or constructive notice to the indorser, against him. And as stated by Chief Justice *Parker*, in 3 Pick. 418 this rule seems to have been always practically recognized.

This point has been decided in the same way in Maine. It is there held, that bills and notes are payable on demand, at any reasonable hour, on the day they fall due, and if not then paid the acceptor or maker may be sued, and also the drawer and indorser, after notice. *Greeley* v. *Thurston*, 4 Greenl. 479. *Flint* v. *Rogers*, 3 Shepley, 67. It is a little remarkable, as mentioned by Mr. Justice *Weston*, that there is no direct English authority upon this point. There appears to be no case in which it has been decided, either that an action may or cannot be commenced on the last day of grace, or day the note becomes due. The general rule in regard to payment of debts, for rent, on bond, for goods sold on credit or otherwise, is, that the debtor has till the last hour of the day, in which to make payment; *Webb* v. *Fairmaner*, 3 Mees. & Welsb. 474; but the case of negotiable bills and notes is uniformly treated as an exception. All the authorities hold, that a foreign bill must be demanded on the last day of grace, and, if not paid, must be noted for protest; and the authorities are equally uniform, that if not thus paid on demand, on the last day, by the acceptor or maker, they may be treated as dishonored, and notice may be immediately given to the drawer and indorsers, and they will be held liable. *Leftley* v. *Mills*, 4 T. R. 170. In this case, Mr. Justice *Buller* lays down the rule very explicitly, and it seems to have been subsequently followed

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He states the rule to be, that if not paid on demand, on the last day, the bill is dishonored, the parties are in default, and the bill may be, and, in case of a foreign bill, must be protested on that day, although notice will be seasonable if given the following day. *Burbridge* v. *Manners*, 3 Campb. 193. *Ex parte Moline*, 1 Rose Bankr. Cas. 303. *S. C.* 19 Ves. 216. It was there held, that demand on the acceptor at 11 o'clock, and notice of non-payment to the drawer the same morning, was good, and warranted the proof of a debt against the drawer, who had become bankrupt.

The rule is uniformly laid down by the text writers, that the bill must be presented for payment on the last day of grace. Bayley on Bills, 126. Chitty on Bills, 365. The latter writer seems to consider the rule established, that the contract of the maker of a note or acceptor of a bill, is to pay on demand, on the appointed day, and if payment be not made on such demand, the contract is broken, and the holder may treat the bill as dishonored.

In a late work, Byles on Bills, it is stated, *p.* 131, that the acceptor of a bill, whether inland or foreign, or the maker of a note, should pay it on a demand made, at any time within business hours, on the day it falls due, and if it be not paid on such demand, the holder may instantly treat it as dishonored. But the acceptor has the whole of that day within which to make payment; and though he should, in the course of that day, refuse payment, which entitles the holder to give notice of dishonor, yet if he subsequently, on the same day, makes payment, the payment is good, and the notice of dishonor becomes of no avail.

This writer cites *Hartley* v. *Case*, 1 Car. & P. 556, 676. *S. C.* 4 Barn. & Cres 341. The point was made in that case, that notice could not be given on the day the note becomes due; but the case went off on another ground, and no opinion was given on this question.

The passage cited appears contradictory to itself, inasmuch as it declares that the note is due and payable on demand on the last day of grace, and is dishonored if not then paid, and yet

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that the maker and acceptor have the whole day to pay it in. It would seem that there could be no dishonor, unless the maker had failed to comply with his contract; and if he has failed to comply with his contract, then, by a general rule of law, the holder has his remedy by action.

Perhaps the state of the law upon this point may be accounted for, by a remark made in Chitty on Bills, 36, who, after saying that notice of dishonor may be given on the same day, adds, it is not usual or necessary to give notice of non-payment before the following morning, and therefore there can be no objection to the allowance of the whole day on which the bill becomes due, to pay it in. It is probable, therefore, that though the holder may have a strict right to proceed in all respects as upon a dishonored bill on the last day, after demand, refusal, and notice, yet it is so far the general practice to postpone notice and other proceedings till the day following, that it is regarded amongst merchants as a right. That it seems so to have been understood by men of business, appears by a remark of Mr. Justice *Buller*, in *Colkett* v. *Freeman*, 2 T. R. 61, and also by an *obiter dictum* of *Bolland*, B. in *Webb* v. *Fairmaner*, 3 Mees & Welsb. 474. But the case of negotiable bills and notes was not then under consideration.

No doubt there is a prevailing understanding in England, that the maker or acceptor has, by right or by courtesy, the whole of the last day to make payment in, and if it is so in fact paid or tendered, there would be little occasion for the holder to insist on his right of action, and decline receiving payment; and so no case has arisen, in which it has become necessary to decide that precise question. Possibly it may be considered, that the holder has a right to treat the bill as dishonored, after demand and refusal, and even to commence an action, subject to be defeated and barred in case the maker should pay the amount due, at any time on the last day of grace; though it is difficult to perceive how the holder can have a perfect right to treat the note as dishonored, by breach of the contract, and, at the same time, that the acceptor can have a perfect right, by payment of the bill.

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to perform his contract, and save himself from the consequences of such breach. In *Hartley* v. *Case*, 1 Car. & P. 556, already cited, *Abbott*, C. J., on a motion to show cause, says, "I think the notice of dishonor, given on the day on which the bill is payable, will be good or bad, as the acceptor may, or may not, afterwards pay the bill. If he does not afterwards pay it, the notice is good; and if he does, it of course comes to nothing."

This certainly implies, that after non-payment on demand, on any part of the last day, there is a breach of the contract of the maker, and no further demand is necessary to complete the holder's right against the maker, acceptor, and indorsers. But whether, after such breach and before the close of the day, an action might be commenced against either, does not appear by this case, nor, as we believe, by any case decided in England.

The only decided case opposed to the opinion which we have adopted, and one entitled to great respect, is that of *Osborn* v. *Moncure*, 3 Wend. 170. In this case, which was an action by the payee against the maker of a note, demand was made on the last day of grace, and, payment being refused, a suit was commenced at three o'clock on the same day. The court were of opinion, that a demand on the maker should be made on the third day of grace, and, on refusal, the holder might treat the bill as dishonored, so far as immediately to give notice to the indorser; yet that the maker has the whole day to pay it in, if he thinks proper to seek the holder. They rely upon the general rule applicable to the case of other debts, that the debtor has to the last instant of the day to make payment, and they consider that in this respect there is no distinction in case of negotiable bills and notes.

It had been frequently held in the courts of New York, that demand must be made on the last day of grace, as well on inland bills and promissory notes as on foreign bills, and if not then paid, the holder might treat them as dishonored and notify the drawer and indorsers. *Jackson* v. *Richards*, 2 Caines, 344. *Corp* v. *M'Comb*, 1 Johns. Cas. 328.

Indeed the rule seems to be settled by all the authorities, Eng

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lish and American, that a demand must be made on the maker or acceptor, within reasonable hours, on the day of maturity, and when the bill or note is in a bank, which has certain fixed and known hours for being open for business, those will be construed to be reasonable hours; that if the bill or note is not paid on demand, it is dishonored, and notice may be immediately given to the drawer and indorsers, and, without further demand or notice, they will be legally bound to make payment. *Tindal* v. *Brown*, 1 T. R. 167, affirmed in Ex. Ch. 2 T. R. 186, *note*. *Bussard* v. *Levering*, 6 Wheat. 102. But what shall be the legal consequence of such dishonor, does not appear to have been decided in England. In the case cited, 1 Car. & P. 676, it was argued by counsel, Scarlett, Holt, and Chitty, and not controverted by the court, because the decision of the case did not require it, that a payment of a bill on the day of maturity, but after actual dishonor, is no better than paying at any time before action brought. And it had long before been decided in *Hume* v. *Peploe*, 8 East, 168, that a plea of tender after the day of payment, though of all the money due on the bill, was not a good plea in bar, because it did not show a performance of the contract. If then there is a breach of contract, by a non-payment on demand, and the tender after a breach is no bar, it would seem to follow, as a necessary legal consequence, that an action would then lie.

But upon this point, the courts of different states have come to different conclusions. In New York it has been decided, as in the case cited, that an action will not lie till after the day. In Maine, as we have already seen, it has been decided that an action will lie, against all the parties, on the day of maturity, after an actual dishonor.

In New Hampshire, *Dennie* v. *Walker*, 7 N. Hamp. 201, the court say, it may now be considered as settled, that notice may be given and suit brought against the indorser on the last day of grace, after demand and notice.

In Maryland, in the case of *Farmers' Bank* v. *Duvall*, 7 Gill & Johns. 89, the court say, it is now settled, that demand may be made on the last day of grace, and if payment be not made,

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the holder may at once treat the note as dishonored, and give notice accordingly. It is not however stated, in terms, that an action may be at once brought.

In South Carolina, in *Wilson* v. *Williman*, 1 Nott & M'Cord, 440, it was decided on great consideration, by a majority of the court, that the maker may be sued on the third day of grace, after demand.

On the whole, we think the weight of authority is in favor of the conclusion to which we have come; and if it were a new question, it seems to follow, on legal principles, as a fair and legitimate conclusion from the established fact that the contract of the acceptor or maker is broken by a neglect or refusal to pay on demand, within reasonable time, on the last day of grace, that the holder may then have his remedy by action. But in this Commonwealth, it is not a new question; it has been settled, we believe, by a uniform series of decisions, and by a long and unbroken course of practice.

It may be proper to make a remark on the point, that some of the cases in Massachusetts manifestly go upon the ground, that when a third person has accepted a bill or made a note payable at a bank, or when, from circumstances, it may be inferred, that the parties intended that the note should be paid at a bank, the maker has the whole of the usual time of banking hours to pay it. This proceeds upon the ground that the parties have entered into an express or implied agreement, that the note shall be so paid and treated. But when the bank itself has undertaken to pay a sum on any given day, they are bound, like any other promisor, to pay on demand, on that day; and the only difference, in this respect, between a bank and an individual, is this, that what would be reasonable time for a demand, in case of individuals, is fixed, in case of a bank, by their known usual hours of being open for business. This is the case in regard to common bank notes, and it would be most pernicious, in regard to them, to establish a different rule, or raise a doubt respecting it. And a post note, when, by the lapse of time and the force of the contract, it has become payable on demand, stands in this

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respect on the same footing with a bank note, which is payable on demand in its terms.

The court are therefore of opinion, that the post note in question was due and payable when the action was commenced; that the attachment of the plaintiffs was well made, and that the petition must be dismissed.

Louisa Delay *vs.* Nathaniel Vinal.

A testator devised to his wife all his property, during her widowhood, subject to his debts and the legacies bequeathed by him, and appointed her his executrix. He also authorized her, during her widowhood, to sell and convey so much of his real estate as she might judge necessary and expedient for payment of his debts, and for her support and that of her children, and for their education. She accepted the trust of executrix and administered upon the estate. She sold, within two years, part of the real estate, under the authority in the will, and shortly after married again. After her second marriage, she sold the residue of the real estate, for payment of debts, under a license of court, and executed deeds thereof, in which her husband joined, making no reservation therein of her right of dower, and being under no misapprehension concerning the condition of the estate. Thirteen years after the death of her second husband, she first claimed dower in the estate sold under said license.

Held that she had accepted the provision made for her in the will, and that her claim to dower was thereby barred.

Writ of dower. The demandant claimed dower as widow of John Tilley, and the parties submitted the case to the court on the following facts: John Tilley died in 1822, and by his will, which was proved and allowed in August of that year, appointed the demandant his executrix, and she accepted the trust. In the said will was this clause; "after the payment of all my just debts, and charges on my estate, I give and devise to my wife Louisa Tilley," (the demandant,) "all the rest and residue of my estate, real and personal, subject to the legacies hereafter given, to her for the term of her widowhood and life. And I do fully authorize and empower the said Louisa, so long as she shall continue my widow, to sell and dispose of any and all such real estate, so devised, as she may judge necessary and expedient to pay off and discharge my debts, which may be due from my estate, and also for the comfortable support and maintenance of

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herself and children, and for their education. And such deeds, executed by said Louisa, shall make a good and sufficient title in fee, to such estate. But in case the said Louisa should again marry, the devise aforesaid and the powers aforesaid are hereby revoked, and I do then give and devise to said Louisa one third of all such estate, real and personal, as shall then remain undisposed of, for the term of her natural life."

By the inventory of the real and personal estate of the testator, which was returned by the executrix to the probate court, on the 9th of September, 1822, it appeared, that besides two undivided fifth parts of a wharf and flats, said Tilley died seized of two thirds of a lot of land at the corner of Charter and Lynn Streets, in the city of Boston, an estate near Cross Street, and a part of Green Island, and also a farm in Douglas, the whole of which was appraised at the sum of twelve thousand and eight dollars. On the 25th of August, 1823, the executrix settled her first account, and charged herself with the personal estate, and with the proceeds of the sale of said Green Island. She also sold, in the same year, the farm in Douglas, under the power in the will; the proceeds, however, were not credited, until the rendering of her second account of her administration, in April, 1824. At the time of rendering her first account, she filed a list of debts and represented the estate to be insolvent. Commissioners were appointed, who reported the amount of the claims of the creditors, by them allowed, to be $2276·39 exclusive of those secured by mortgage; but the estate was never decreed to be insolvent. The executrix intermarried with John Delay in the early part of the year 1824, and he died in the year 1835. She, with said Delay, her husband, presented a petition, in her capacity of executrix, to the court of common pleas for the county of Suffolk, for leave to sell said two undivided fifth parts of said wharf and flats, and said two thirds of the lot at the corner of Charter and Lynn Streets, for the payment of the debts of said Tilley, as by a partial sale thereof the residue would be injured. This petition, after due notice, was granted at the October term of the year 1824. And the executrix, having conformed to the law in such cases provided, duly sold

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said estates at public auction, and on the 3d of November following, she and said Delay, her husband, duly made, acknowledged, and delivered deeds to the purchasers. There was no reservation in the deeds, by the said executrix and her said husband, of any interest or right in said premises on her part, nor was any such claim or reservation made either in the petition for the license, or in the advertisements of the sale, nor at the said auction. Shortly afterwards, the said executrix and said Delay, her husband, settled a final account of the administration of the estate of said Tilley, and therein charged themselves with the proceeds of the said sales of said estate and the other assets, and claimed an allowance for the payment of the mortgages and the debts of the testator; and there remained in their hands a balance in money amounting to $2073. This account was allowed by the judge of probate. At the time of the death of said Tilley, both said two undivided fifth parts and said two third parts, disposed of at said auction, were subject to mortgages made by the testator as collateral security for the payment of his promissory notes, amounting, at the time of sale, to $3546·79, which sum was paid from the proceeds of said sale, and the payment thereof was allowed to the executrix in her third and last account. The estate near Cross Street remained in the occupation of the demandant, and was appraised in the inventory at the sum of $2800. The demandant claims dower, in this action, in that part of said two undivided fifths of said wharf and flats, which was assigned, on a partition, to the assignee of the purchaser at the auction, from whom the tenant deduces his title.

The demandant never [expressly] waived the provision made for her in the will of said Tilley, and the purchasers of the wharf and flats and those holding under them, have, ever since the auction aforesaid, been in peaceable possession of the premises, no claim of dower having been made until the 12th day of November, 1838. All the said probate proceedings and records referred to with the conveyances, form a part of this case.

If, on these facts, and the inferences to be legally drawn from them, the demandant is entitled to recover dower in the prem

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ises, then such proceedings are to be had for the assignment or ascertainment of the dower, and the amount of damages, as the court shall direct; otherwise she is to become nonsuit.

The case was argued in writing.

W. Minot and *B. Rand*, for the demandant. This case is not affected by the revised statutes, but depends on the construction of the previously existing law. By the common law, a widow was entitled to dower, and also to the provision made for her in her husband's will, unless it was clear that the husband intended such provision to be in lieu of dower. But by *St.* 1783, *c.* 24, § 8, she was not to have dower and the testamentary provision also, unless it was plain that such provision was intended to be in addition to dower. The only difference between this statutory law and the law previously existing (so far as it regards the *right*,) is, that in a doubtful case the widow is put, by the statute, to her election between dower and the provision by will. And as it respects the *remedy*, the only difference is, that acceptance of a provision by will, in lieu of dower, cannot, by the common law, be pleaded in bar of a writ of dower, (Co. Lit. 36 *b*. *Mundy* v. *Mundy*, 2 Ves. Jr. 129. *Lawrence* v. *Lawrence*, 2 Vern. 365,) but could only be set up in a court of equity, where all equitable circumstances might be taken into consideration. As we had no court of equity at the time of the passing of the act of 1783, *c.* 24, it may be inferred that the intention of that act was, that the acceptance of a testamentary provision might be set up as a defence at law to a writ of dower, and that the principles adopted in courts of equity should be administered by the courts of law, in reference to such defence. The doctrines of the English courts of equity are therefore applicable to this case.

The demandant denies that she has accepted the testamenta ry provision, either expressly or by implication of law. Mere lapse of time does not preclude the right of election, nor raise a presumption that an election has been made. *Butricke* v. *Brodhurst*, 3 Bro. C. C. 90. 1 Ves. Jr. 172. Stalman on Election & Satisfaction, 266. In *Reed* v. *Dickerman*, 12 Pick. 146, the portion devised to the widow had been set off to

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her by a decree of the probate court, and she had enjoyed it and other things provided for her in the will, for fourteen years; and the decision turned upon her acts evincive of her election. In the case at bar, no unreasonable time has elapsed, and the demandant's acts in the probate court, charging herself with the proceeds of sales, representing the estate insolvent, &c. manifested her intention not to accept the provision made for her by the will. She had a right, before electing, to time sufficient to obtain full knowledge of her husband's circumstances and her own rights, and to learn the comparative value of the provision and of her dower. Stalman on Elect. & Satisf. 267, 268. Clancy Husb. & Wife, 249.

The demandant denies that she accepted the testamentary provision by exercising the power of sale conferred by the will. The devise and the power to sell are not so connected that the latter cannot be exercised without showing an intention to accept the former. The power is given in a distinct clause of the will, and authorizes sales for the payment of debts, and she might well sell, as she did, for payment of debts only, without manifesting an intent to exercise the power in her own favor.

But if the demandant did acts evincing an election of the provision, she is not concluded thereby, if she were not aware, at the time, of the amount of debts, or of the value of her dower, or was, in any other respect, ignorant of her rights. 1 Roper Husb. & Wife, 582, and books last cited. *Wake* v. *Wake*, 1 Ves. Jr. 335. *Pusey* v. *Desbouvrie*, 3 P. W. 315.

The neglect to claim dower until after the second husband's death does not impair the demandant's right. No lapse of time, short of the statutory limitation, can bar it. Her second marriage was only about 18 months after the probate of her first husband's will, and she was under coverture till 1835. During this time she could make no election herself, nor could her husband for her, (except under direction of a court of equity,) which would prejudice her claim to the dower now demanded. Stalman on Elect. & Satisf. 190, 191.

Nor is the demandant estopped by the deed executed by herself and second husband, in pursuance of the authority conferred

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by license of the court of common pleas. That authority was limited to the sale of the estate of the first husband, and was for the purpose of paying his debts. The deed recites the authority and the purpose of it; purports to convey only such estate as was to be sold pursuant to the authority; and was executed by the demandant only in her representative capacity. And of all this and of the circumstances of Tilley's estate, the purchaser was well aware, and of course offered and paid a price accordingly. There was no concealment of any title, and no pretence of conveying more than the deceased's interest, and no consideration received for any thing more. *Leavitt* v. *Lamprey*, 13 Pick. 382. The cases of *Heard* v. *Hall*, 16 Pick. 457, and *Poor* v. *Robinson*, 10 Mass. 131, are not applicable to this case. Besides, the wife was under coverture, and not *sui juris*, when she executed the deed, and if she had expressly included therein her right of dower, it would not have barred her claim, within the law of this Commonwealth. *Fowler* v. *Shearer*, 7 Mass. 19. *Durant* v. *Ritchie*, 4 Mason, 45. Rev. Sts. c. 60, § 7. *Croade* v. *Ingraham*, 13 Pick. 35. *Martin* v. *Mitchell*, 2 Jac. & Walk. 425.

Aylwin and *Paine*, for the tenant, argued, 1st. That the right to dower was barred by the demandant's acceptance of the provision in the will. Such acceptance is shown by various facts and circumstances. She never expressly waived that provision; nearly two years elapsed after the first husband's death before her second marriage; her second marriage continued eleven years, and it was not till three years after its termination that she made any claim of a right to dower. The estate consisted almost wholly of real estate, the value of which and of the other property was immediately known to the demandant, as executrix. *Reed* v. *Dickerman*, 12 Pick. 146. The provision was very liberal and beneficial, and therefore it must be presumed to have been accepted. *Merrill* v. *Emery*, 10 Pick. 507. The power of sale was so unlimited that the devise seems to amount to a fee simple, and not to belong to the class of conditional powers of sale referred to in *Minot* v. *Prescott*, 14 Mass. 495, and *Stevens* v. *Winship*, 1 Pick. 318; and if she had a fee simple, she

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could not have a right of dower. The exercise of the power of sale was an express acceptance of the testamentary provision. *Larned* v. *Bridge*, 17 Pick. 339.

2d. The demandant is estopped by the sale and deed made by herself and second husband. *Poor* v. *Robinson*, 10 Mass. 131. *Heard* v. *Hall*, 16 Pick. 457.

A wife, by joining with her husband, or by a separate deed, may bar herself of dower in his lands. *Stearns* v. *Swift*, 8 Pick. 536. Why not estop herself to claim dower in a former husband's lands? A feme covert's disability is not from a supposed want of capacity, but from her union with her husband, and her subjection to him. She may act *en autre droit* without her husband. 4 Petersd. Ab. 67.

The demandant's coverture makes no difference in her favor. She had full opportunity for election before her second marriage, and her subsequent disability was voluntarily incurred. By the second marriage, the right of election devolved on her husband, and his acts, affecting that right, bind her not only during coverture, but for life. Bing. on Inf. & Covert. 224. Co. Lit. 246. If she had been an infant, perhaps her husband's election would have bound her only during that coverture. *Harvey* v. *Ashley*, 3 Atk. 617. A disability, which prevents the operation of the statute of limitations, must exist at the time the right first accrues; and the principle of that rule is applicable to this case. *Eager* v. *Commonwealth*, 4 Mass. 188.

Dewey, J. The husband of the demandant having been seized, during coverture, of the premises in which dower is demanded, she became entitled, on his decease, to her dower in the same, and may now enforce that right, unless she is legally barred by her own acts. By *St.* 1783, *c.* 24, § 8, it is provided, in the case of a devise by the husband to the wife, that unless it plainly appears by the will that the devise was intended to be in addition to her dower, the widow must waive the provision in the will, if she would claim her dower. In the present case, the provision made for the demandant, in the will of her husband, not only does not plainly appear to have been intended to be in addition to her dower, but was manifestly designed to supersede any such claim

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The question then arises, whether she has waived the provision in her behalf contained in that will.

That the right of election ought to be exercised within a reasonable time, seems to be well settled. But what should be the precise limit as to the time within which such waiver of the devise could be properly made, was left without any distinct or definite provision until the enactment in the Rev. Sts. c. 60, § 11, requiring the widow, within six months after the probate of the will, to make her election whether she will take the devise in the will of her husband, or be endowed of his lands. The right of the demandant, however, accrued previously to the revised statutes, and must therefore be settled by some other rule. In the absence of any particular statute regulations, it would seem reasonable that the widow should have at least a suitable opportunity for attaining full knowledge of all the circumstances necessary to enable her to form a judicious opinion upon the question of accepting the provision made for her in the will, or of waiving that and taking her dower at common law.

The present, like most similar questions that have arisen, does not depend upon the effect to be given to mere lapse of time, during which the widow has omitted to waive formally the devise to her, but presents also certain acts on her part indicating her acceptance of the provisions of the will.

Under the authority given her by the will, she disposed of two parcels of the real estate of her husband, viz. the Green Island estate and the Douglas farm. The legal effect of this exercise of power under the will must depend very much upon the view that is taken of the nature of this authority, and the object and purposes for which it was given, and with reference to which it must be understood to have been exercised.

The demandant contends that the devise to her, and the power to sell real estate, are not so connected, that the exercise of the latter implies an acceptance of the former; that it may well be taken that the widow might exercise it solely for the purpose of discharging the debts of the testator, without authorizing an inference of her accepting any provision for herself that would deprive her of her dower. On the other hand, it is con-

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tended by the tenant, that the power to sell was connected with the provision made for the demandant for her own support and the maintenance and education of her children, as well as the payment of debts, which latter must of course be discharged before she could enjoy the estate; and that the demandant, having acted under this power, acted for both purposes, and her acts therefore not only are inconsistent with a waiver of the devise to her, but, on the contrary, furnish a strong inference of her acceptance of the same.

It seems to us, that the provision made in the will for the widow, and the authority to sell the real estate, are connected, and constitute one general arrangement for securing to her the full enjoyment of the bounty of the testator. The power to sell is not given to her as executrix, or to be exercised by her in that capacity, but vested in her, independently of her acceptance of the trust of executrix, and as the means of carrying into effect the provisions of the will in her favor.

The sale by her under an authority contained in the will, in the clause under consideration, would seem fully to authorize the inference of an acceptance by her of the devise in her favor, unless in executing the power of selling, she expressly disclaimed all provision in the will for her benefit, and asserted her purpose to insist upon her right of dower.

It was suggested in the argument, on the part of the demandant, that if the widow had in fact done some acts which might indicate an acceptance of the devise, yet if this was done under a misapprehension of her right, or in ignorance of facts materially affecting her pecuniary interest in the matter, she ought not to be concluded by her acceptance of the devise under such circumstances. This rule has been liberally applied in many cases in the English courts. Its applicability to the present case may well be doubted, upon the facts stated. There was nothing in the circumstances of this estate, that was calculated to mislead the demandant, or that may be supposed to have disappointed her reasonable expectations. The right to recur to her dower at common law, upon such ground, if exercised at all, after having indicated an acceptance of the devise, should be at the earliest

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possible period after she should come to the knowledge of these facts, from an ignorance of which she had been misled. But in the present case, the widow, acting in the capacity of executrix, was early apprized of the situation of this estate, but continued to act without asserting her rights, and stood quietly by, withholding all notice of any intended future claim of dower in the premises, at the time of the sale of the land to the tenant under an authority of the court; no claim of dower being made until November, 1838, a period of sixteen years from the death of her first husband, two years of which elapsed before her marriage with Delay, and three years after the death of Delay.

We have not found it necessary to consider particularly the effect of the conveyance by the demandant and her second husband of this real estate, under the order of court just referred to. The principle settled in the case of *Poor* v. *Robinson*, 10 Mass. 131, would go very far to sustain a defence put solely upon this ground, unless the circumstance that the demandant was a feme covert at the time of executing the deed should prevent its operation as respects her. The defence being well sustained upon other grounds, the effect of that conveyance is not to be considered as adjudicated upon in the present case.

Demandant nonsuit.

Belinda Thompson *vs.* John A. McGaw & others.

A woman is "deprived of the provision made for her by will, in lieu of dower," within the meaning of the Rev. Sts. c. 60, § 13, and is entitled to be endowed, if all the property of the testator is taken, or required, for the payment of his debts. And she is thus entitled, in such case, where the provision is by devise of all the testator's property, on condition that she pay all his debts, legacies, &c. as well as when the provision is by bequest of a certain sum of money, or of specific property.

It is no objection, in such case, to an application to a probate court for an assignment of dower, that a previous application had been made and refused before there was sufficient evidence that the petitioner would be deprived of the provision in the will, and that she did not appeal from the decree of refusal.

This was an appeal from a decree of the judge of probate in this county, disallowing the appellant's claim to dower in the

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estate of her late husband, Erasmus Thompson. The will of said Erasmus, proved on the 28th of August, 1837, was this: "I give to my wife, Belinda Thompson, upon condition that she shall pay to each of my sisters [naming two] the sum of $100, and afford to my mother a competent support during her life, all the real and personal estate of which I shall be the owner at the time of my decease, after my just debts shall have been paid, with all the privileges and appurtenances necessary for the enjoyment of the premises; to hold, occupy, and enjoy the said estate so long as she shall remain my widow. But in case of a second marriage on the part of my wife, I give to her one third only of my real estate, and to my children the remaining two thirds." The appellant was appointed executrix of the will, took out letters testamentary, returned an inventory on the 25th of September, 1837, and exhibited a list of debts and represented the estate to be insolvent on the 11th of June, 1838, when she also represented to the judge of probate that the provision made for her in said will had wholly failed, by reason of the insolvency of the estate, which was not known nor suspected by her until more than six months after probate of the will; wherefore she petitioned to be endowed in the lands of her husband. This application for dower was denied by the judge; but commissioners of insolvency were thereupon appointed, who returned, in January and May, 1839, debts proved before them to an amount which rendered it probable that the estate would be insolvent, or, at least, that nothing would be left for the appellant, under the provisions of the will. On the 7th of January, 1839, the appellant again presented to the judge of probate a petition to be endowed, setting forth that the testator's real estate must be sold for payment of his debts, and that a sale thereof could not be made without great loss, until her claim to dower should be determined. The judge decreed that she was not entitled to dower.

The reasons of appeal from this decree were, 1. Because the testator, not aware of the condition of his property, when he made his will, and afterwards until his decease, represented to the appellant that said estate would amount to a large sum, and

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she thereupon believed she should enjoy the whole of it subject to the charges imposed by the will; and this erroneous belief remaining unaltered for more than six months after probate of the will, she was prevented from making an election between said supposed provision and her dower. 2. Because, in truth, said will did not contain any real provision for the appellant. 3. Because, under the circumstances of the case, she was not, and could not be, held to make an election.

The case was argued in writing.

W. D. Sohier, for the appellant.

As the provision made for the appellant, in the will, was a *residue* of an estate, after payment of debts, subject to legacies, &c., it was impossible to estimate, within six months, what the product would be. Four years are allowed to creditors to claim payment of their debts, and until the amount of the debts and of the estate could be certainly known, there was nothing but her husband's representations to induce the appellant to elect between dower and the provision in the will; and she was prevented by her belief of those representations, for more than six months, from electing her dower. She has not evinced, by any act, however equivocal, an intention to forego her right of dower; and until she has clearly given her assent to accept the provision in the will, after full knowledge of her rights, it is not to be presumed that she has bartered her dower for it.

The Rev. Sts. *c.* 60, § 11, create a case of compulsory election between dower, and a gift, which, in effect, is offered to the donee on the condition that an independent right shall be surrendered. In such case, the party is entitled to know the precise value of the benefit, and to be fully cognizant of the nature and extent of her rights in respect to each subject matter of the choice cast upon her. *Pigott* v. *Bagley*, McClel. & Younge, 569. *Hall* v. *Hall*, 2 McCord Ch. 280. Is there any presumption that without such knowledge an election has been made? As the appellant has made no *actual* choice of the contingent and incumbered testamentary provision, her application for dower should be viewed as if she had omitted to comply with the requisitions contained in that section of the statutes. The judge of probate

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rejected her claim because she *did not* seasonably *elect* to take her dower; not because she *did elect*, in preference, the illusory provision in the will.

But even if her assent to accept the provision in the will were proved, nothing has come to her hands in consequence thereof; no change has thereby been caused in the circumstances of the estate, or of other parties interested therein; and she may recall it. 2 McCord Ch. 280. Assent obtained or induced by deception, or given in ignorance of facts, is inoperative. If by an assent given with a perfect knowledge, the testamentary provision has been elected in preference to dower, and the appellant shall be deprived thereof, she is to be endowed by virtue of Rev. Sts. c. 60, § 13. Therefore, if the insolvency of the estate is admitted, and she shall be held to an enforced election of the testamentary provision, her dower should be assigned to her upon this application.

The appellant was not obliged to make an election, under the circumstances in which she was placed. The subjects, respecting which a choice was to be made, have not both been before her, nor has she had the power to take, or even to ascertain that it will be possible to take, the provision intended for her by the will. The statute before cited does indeed peremptorily require, that if any provision be made for a widow in her husband's will, she shall, within six months after probate, elect between the provision and her dower, for the purpose of preventing her taking both, unless it shall plainly appear that her husband intended she should take both. Here was a devise of all the estate; and by such devise, is it not manifest, that in addition to the right of dower, the testator intended that the widow should enjoy such other title as he could confer by will? If so, there was no necessity, under the statute, for an election. If not so, there was neither a cause nor an opportunity to make an election. The widow was to take *all* the real estate, if there was any, and if there was neither real nor personal property remaining when the estate was settled, there would not be two subjects upon which a choice could be exercised.

But if, by the statute, an election is demanded under all cir-

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cumstances, when there is a semblance of provision for the widow in the husband's will, what are the consequences of a refusal or neglect to observe this requisition? Will the right of dower and the testamentary provision be *both* lost, or will only one, and which of them, be withdrawn? The loss of both cannot be inflicted as a penalty for disregard of the statute. And it is clear that, without the plain intent of the husband that both shall be taken, the widow can take but one. Which shall be hers, in such case? The answer must be, the right which belonged to her before the testamentary provision was presented to her as a substitute for such right. See *Hastings* v. *Dickinson*, 7 Mass. 153. *Gibson* v. *Gibson*, 15 Mass. 106. *Morgan* v. *Edwards*, 1 Bligh (N. S.) 401. *Harvey* v. *Ashley*, 3 Atk. 616.

Aylwin and *Paine*, for the appellees. The just inference from the Rev. Sts. *c.* 60, § 11, is that a widow, who has a provision in her husband's will, cannot be silent for six months after probate of the will, except at the risk of having a legal presumption drawn that she assents to the provision in lieu of dower. The statute of 1783, *c.* 24, § 8, changed the rule of the common law, that a devise to a widow should be presumed to be in addition to dower, and reversed the presumption. *Merrill* v. *Emery*, 10 Pick. 507. *Reed* v. *Dickerman*, 12 Pick. 146. The only question, in such cases, before the revision of the statutes, was whether a reasonable time had elapsed within which the intention of the widow to conform to the will was to be presumed. If she did not, within such time, waive the provision, she was held to have accepted it, and was barred of her claim to dower. Where there was no opportunity for her to manifest a choice, the legal result depended on the question which was most beneficial, the provision in the will, or dower? 12 Pick. 146. The revised statutes have, by a positive enactment, closed the door to all controversy as to time. The widow must make her election within six months after probate of the will. The commissioners declared that it was their intent to conform to the existing law, with the addition of a limitation of time. If, however, because there is no legislative declaration what shall be the consequence of omitting to make an election, the widow may claim

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her dower, as the appellant's counsel suggests, then the former law is repealed.

The appellant's first reason of appeal proceeds on the hypothesis that she had assented to the testamentary provision, and seeks to avoid that assent because it was given under a mistaken belief that the estate would amount to a large sum of money. She, however, being executrix, was immediately in a situation to ascertain the amount of the testator's property, and she returned an inventory thereof, within a month after the will was proved. She also filed a list of debts, and represented the estate to be insolvent, about six weeks only after the expiration of six months from the probate of the will This was, therefore, not a case of surprise.

The truth of the second reason of appeal, however probable, cannot now be proved. The estate has indeed been represented insolvent. *Non constat* that there will be an absolute insolvency. In the language of this court, in *Crane* v. *Crane*, 17 Pick. 427, on a similar subject, " we cannot say that this is no provision for the widow within the meaning of the statute. The deceased certainly made a will, and in point of fact expressed his intention concerning his wife." A residuum only was devised to the appellant, and that residuum, if there be any, she will have.

The necessity of making an election within six months does not depend on the sufficiency of the provision, or on its being equivalent to dower at law. It may rise or fall in value. It is enough, if any provision be made and be known to the widow, to put her to an election. Such a case has some resemblance to an assignment of dower against common right. If it is accepted, it is to be taken with all its advantages and disadvantages, so far at least as it regards value. *Jones* v. *Brewer*, 1 Pick. 314. If the provision had been of shares in a bank which afterwards failed, it could not be pretended that this would give a right to an assignment of dower.

As to the recalling of the appellant's assent to the provision, and her right to be endowed, within the equity of the thirteenth section of the statute, the answer, in the first place, is that six

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months are given her to consider all the circumstances which may affect her interest, and she must, in that time, form her determination at her own peril. It was with a view, in part, to exclude all pretences of mistake, &c. that this definite limitation was prescribed. Any occasional inconvenience caused by it is doubtless greatly overbalanced by the settling of a fixed rule. Besides, the thirteenth section of the statute provides only for cases where the widow is evicted, or is deprived of the provision made by the will of the husband. The joining of the two classes makes the legislative intent manifest. The first is by eviction, and necessarily by paramount title. This, of course, can take place only after an assignment of dower, and then the widow is endowed anew. So of being deprived of the provision. This must arise from a similar cause. It must be the entire loss of the thing provided, from want of title or ownership by the husband, which furnishes the claim to a new provision.

Dewey, J. The appellees insist that the right of dower is barred by reason of the provision made for the appellant in the will of her husband, and her implied acceptance of the same. They rely on the Rev. Sts. *c.* 60, § 11, wherein it is enacted that "if any provision be made for a widow, in the will of her husband, she shall, within six months after probate of the will, make her election whether she will take that provision or be endowed of his lands; but she shall not be entitled to both, unless it plainly appears, by the will, to have been the intention of the husband, that she should have such provision, in addition to her dower." The earlier statute of 1783, *c.* 24, § 8, contained no provision as to the time within which the election was to be made, and each case was decided upon its own peculiar features, no precise rule, as to the effect to be given to the lapse of time, having been adopted. The appellees contend that, by the revised statutes above referred to, a limited period of time is now prescribed, within which this election is to be made, and that the omission of the widow to make such election, within six months after the probate of the will, amounts to a waiver of her right to dower.

Assuming such to be the true construction and proper effect

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to be given to § 11 of the statute, the delay of the widow to elect would constitute a good *prima facie* defence to her claim of dower; and if the case disclosed no other facts in aid of her right, the bar would be perfect. But by the same statute, § 13, it is further provided, among other things, that "if a woman is deprived of the provision made for her, by will or otherwise, in lieu of dower, she may be endowed anew, in like manner as if such provision had not been made." And the further inquiry is, whether the widow is within the reasonable construction of this section of the statute, and may now insist on her dower, as one deprived of the provision made for her in the will. She now insists that upon the final settlement of her husband's estate, after discharging all his debts, there will be no residuum, and that the entire provision therefore fails. There has been no *laches* on her part as to the time of asserting her claim under § 13 of the statute. After the failure of the provision by will in her favor was known, she, at a very early period, and before any change had taken place in the real estate, or any interests had been acquired in the same, by any sale or disposition thereof, insisted upon her right of dower.

Had the provision in her favor been a certain sum of money, certain articles of personal property, or a parcel of real estate, and had she been deprived of the same by its being absorbed in the payment of debts, the case provided for in § 13 would clearly have occurred, and she would be entitled to her dower. The only difficulty here arises from the peculiar language of the provision in the will; "all the real and personal estate of which I shall be the owner at the time of my decease, after my just debts shall have been paid," &c. It is said that all she was to receive was the residuum, and therefore she will now receive all that was given by the will, and that the amount of the same was a contingency to which she subjected herself by accepting the provision of the will. And it is true, that as to the amount of this residuum, it was a contingency to which the provision was necessarily subject; but the will clearly contemplated a residuum, more or less. It assumed that the estate was to be a solvent estate, and that after payment of the debts and legacies

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charged upon it, some provision would remain. Indeed from the clause added by way of further provision, in case of the marriage of the widow, that she should have only one third of the real estate, it is quite apparent that the expectations, held out to the widow on the face of the will presented for her acceptance, were that the provision made for her would, in any event, exceed one third of the real estate.

If the estate be insolvent, and after applying the entire property it shall appear that there was no residuum in the power of the testator to devise, then the provision made for the widow in the will has wholly failed, and we think she may claim her dower. Before such a decree can be passed, however, it will be necessary to ascertain the whole amount of debts and liabilities against the estate, and the value of all the real and personal estate, estimating its value without the incumbrance of the widow's dower; and if it shall appear, from a comparison of the debts and liabilities with the assets, that the estate is insufficient to discharge said debts and liabilities, and that no surplus will be left, the widow will take her dower as prayed for in her petition. We see no objection to such a decree, from the fact that it appears on the records of the probate court that at some period prior to filing her present petition for dower, the appellant made a similar application to the judge of probate, which was denied, and from which decision no appeal was taken. At the time of making that application, no sufficient evidence existed of the actual insolvency of the husband's estate, which would authorize a decree assigning her dower. If, therefore, upon a further hearing, it shall appear that there will be no residuum, under the provision in the will, the appellant will be entitled to a decree for dower

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George G. Gibson *vs.* Josiah P. Cooke.

Where property, real and personal, was devised in trust, the rents, issues, and income thereof to be paid to the *cestui que trust*, and a part of the real estate was taken for a rail-road, and the damages thereby caused were paid to the trustee; it was held that such damages were not income, &c. to be paid to the *cestui que trust*, but were a substituted capital, of which the interest only was payable to him.

Bill in equity, praying that the defendant may be compelled to pay to the plaintiff his distributive share of money received by the defendant of the Boston and Worcester Rail-road Corporation, for damages awarded by reason of their having taken to their use certain real estate, the income of which was devised, by Susan Gibson, to the plaintiff and others. From the bill and answer, it appeared that the said Susan Gibson, by her last will which was duly admitted to probate, after making certain bequests, devised the remainder of her estate, real and personal, to the defendant, in trust, to collect the rents, issues, and income, and to pay over the net proceeds, once a quarter, equally to and among her children, of whom the plaintiff was one. The testatrix also directed that no part of her real estate should be sold, except to pay legacies, while any of her children should be alive. The defendant was constituted sole executor of this will, as well as sole trustee under the residuary clause therein, and gave the bonds required by law in such cases, on the 11th of May, 1829. On the 30th of December, 1833, he received from said rail-road corporation a sum of money awarded as damages, as above mentioned, and has ever since included the interest thereon with the other rents and profits of the estate, and distributed the whole, quarterly, among the testator's children; supposing the said sum so received as damages, to be a part of the capital, which should not be distributed.

The case was submitted without argument.

Shaw, C. J. The damages received from the rail-road corporation are not income within the meaning of the will which constituted the defendant a trustee, and prescribed his duties. The easement acquired by the corporation is substantially a de-

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struction of the estate, although a naked fee therein remains to the trustee or *cestui que trusts*. The money received as damages is to be regarded as capital substituted, by act of law, in the place of the land taken; and the income thereof is to be distributed, as the income of the land would have been, if no easement had been created therein. *Emerson* v. *Cutler*, 14 Pick. 118.

JOHN PEDRICK *vs.* STEPHEN WHITE & another.

A supplemental bill ought not to be filed as a matter of course, but only by leave of the court upon sufficient cause shown; and the supplemental matter must be verified by affidavit, or other satisfactory proof.

To warrant the filing of such bill, it should be shown to the court, either, 1st. That the matter, relied upon as supplemental, arose after the original suit was commenced; or 2d. That the facts relied upon first came to the plaintiff's knowledge, or were made known to him in such a manner that he could avail himself of them, after the cause had passed the stage in which he might have had leave to amend; or 3d That the plaintiff has been prevented, through inadvertence, misapprehension, &c. of himself, or his agents or counsel, or other cause satisfactorily shown, from availing himself of the proposed matter of his supplemental bill, at an earlier stage of the cause.

THIS was a supplemental bill in equity, filed without leave of the court, after answer to the original bill, issue joined, evidence taken, and publication passed. The defendants demurred thereto, assigning various causes of demurrer, which were fully argued. The discussion of those points only, which were noticed by the court, is here inserted.

Brigham, (*C. P. Curtis* was with him,) for the defendants

Before a supplemental bill can be filed, in a case like this, leave therefor must be obtained of the court. 1 Hoffm Ch. Pract. 403. *Eager* v. *Price*, 2 Paige, 333. Lubè's Analysis, 171. 2 Mad. Ch. Pract. 404. Want of such leave is a proper exception on demurrer. 1 Hoffm. Ch. Pract. 405.

The bill cannot be sustained, as it is accompanied by no proof of the allegations therein, either by oath or other verification. Lubè, *ubi sup.*

G. Minot, (*Choate* was with him,) for the plaintiff. The

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rule which requires leave of the court to file a supplemental bill, in such a case as this, is peculiar to New York. This court has published no such rule. Even in New York, leave is granted *ex parte*, like leave to plead double in an action at law. *Lawrence* v. *Bolton*, 3 Paige, 294. *Eager* v. *Price*, 2 Paige, 333.

The English works on equity pleading do not intimate that leave must be asked to file a supplemental bill. Cooper Eq. Pl. 73. Mitford, (3d ed.) 48. In Story's Eq. Pl. 270, it is said not to be always a matter of right, but no criterion is mentioned by which to distinguish when it is of right and when within the discretion of the court.

There is no instance in which a mere supplemental bill, founded on newly discovered evidence, was ever objected to, in England, because leave was not obtained to file it, except where a *decree* had been previously made. Lord *Hardwicke* passed an order (2 Atk. 139, *note*,) that after a decree, leave should first be asked. The rule cited from Lubè and 2 Mad. Ch. Pract. applies only to bills of review, or supplemental bills in the nature of bills of review, or after a decree has been passed. *Anon.* 2 P. W. 284. Willis Eq. Pl. 376, *note*.

There are numerous cases in which no leave appears to have been asked, and no objection made on that account. *Usborne* v. *Baker*, 2 Mad. R. 379. *Crompton* v. *Wombwell*, 4 Simons, 628. *Greenwood* v. *Atkinson*, 5 Simons, 419. *Philips* v. *Clark*, 7 Simons, 231.

If, in strictness, leave ought to have been first asked, yet as the want of it is not apparent on the record, the objection cannot be taken by demurrer. The defendants should have moved that the bill be dismissed.

No precedent requires that the bill should be verified by oath or otherwise. Equity Draftsman, (Am. ed.) 626. Lubè, on this point, as well as on that of prior leave, mentions only bills of review, &c.

SHAW, C. J. This case comes before the court on a demurrer to a supplemental bill. Several causes were assigned but they mainly resolve themselves into two, namely :

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1. That this supplemental bill was irregularly filed, being done without leave of the court first obtained for the purpose; and

2. That it does not appear, either by the bill itself, or by any affidavit or other evidence in support of it, that the matter set forth in the supplemental bill has been newly discovered, or that it could not have been introduced originally, or by way of amendment, into the original bill.

The practice of chancery, in all its various details, is still so comparatively new in this court, and the court are so frequently called upon to examine and apply the rules to new cases as they occur, amidst the pressure of common law engagements, that we are obliged to proceed with caution, and are in danger of falling into some irregularity.

From the short examination which we have been able to give the subject, being disposed to speed the cause by an early decision, it appears to be an established rule, and on the whole a useful one, that a supplemental bill ought not to be filed as a matter of course, but only by leave of the court first obtained; and that upon sufficient cause shown. The filing of a supplemental bill after the cause is at issue, and publication of the evidence passed, might lead to great delay and abuse, and operate as a means of evading many of the salutary rules requiring the parties to set forth their full grounds, and procure all the evidence they respectively rely upon, before publication.

In order to lay the foundation for filing a supplemental bill, it ought to be shown to the satisfaction of the court, either

1. That the matter, relied upon as supplemental, has arisen since the commencement of the original suit; or

2. That the facts relied on have first come to the plaintiff's knowledge, or been made known to him in such a manner that he could avail himself of them, since the cause has passed the stage in which he might have had leave to amend; or

3. That the plaintiff has been prevented, through inadvertence, misapprehension on the part of himself, or his agents or counsel, or by some other cause satisfactorily shown, from availing himself of the matter proposed to be introduced by his supplemental bill, at an earlier stage of the cause.

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The supplemental bill must be confined to such matter, and must be verified by affidavit or other satisfactory proof.

Whether, in case of a supplemental bill filed without leave of court, the objection should be taken advantage of by demurrer or motion to dismiss, is a question which it is not necessary to decide; because the plaintiff has moved for leave to file such a bill, and the court are of opinion that it is not too late, if sufficient cause is shown, to sustain it. The case will therefore stand open upon that motion.

GILBERT HOPKINS & another *vs.* ISAIAH C. RAY & Trustees.
AVERY SMITH & others *vs.* THE SAME.

An assignment made after the statute of 1836, *c.* 238, took effect, though not conformable to that statute, is not void, but voidable, as against the assignor's creditors.

When, under the authority given by such assignment, the assignees sell the assigned property, and take notes therefor on time, they cannot be held as trustees of the assignor, if summoned as such before the notes are payable.

THE question in these cases arose upon the answers of T. Coffin and E. M. Gardner, who were summoned as trustees of Ray, the defendant. The facts are stated in the opinion given by the court.

Coffin, for the plaintiffs.

C. P. Curtis, for the trustees.

SHAW, C. J. The trustees disclose an assignment made to them, in 1837, by Isaiah C. Ray, the principal defendant, of a considerable amount of goods, in trust for certain creditors. This being made after the passage of the statute of 1836, *c.* 238, and not being made in conformity with that statute, would not be sufficient to enable them to hold the property against an attaching creditor. But the court are of opinion, that the property was not in an attachable condition. The trustees, in their answer, disclose the assignment, by which they were authorized to sell and dispose of the goods in such manner as they should think most advisable, within one year, and then close the sale at auction. Pursuant to this authority, they had sold the goods to

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ting off of cross judgments, under the direction of the court, and enact, that if there are several defendants, each of them may bring a cross action against the original plaintiff, and on recovering judgment, may be allowed to set off such several judgments against the plaintiff's judgment in like manner as if against himself alone.

This provision is exactly adapted to meet the circumstances of particular cases, to be determined by the court. Such set-off of judgments would, of course, be allowed, where the plaintiff could show no several counter demand, but would not be allowed where it would defeat the just rights of the plaintiff against either of such several defendants. The subject is stated by the commissioners who reported the revised statutes, in a note to *c.* 90, § 45.

The court are of opinion, therefore, that if a review were granted and the execution superseded, the defendants could not file their account in off-set, and that if they have any remedy, it is by a cross action.

Petition dismissed

MOSES WILLIAMS *vs.* SAMUEL WADE.

The indorsee of a note made and indorsed in another State, must do all that is required by the law of that State to charge the indorser, before he can maintain an action against him in this State.

ASSUMPSIT by the indorsee against the indorser of a promissory note made and indorsed in Illinois, where the maker and indorser resided at the time of the making and indorsing.

It was agreed by the parties, for the purposes of this hearing, that by the law of Illinois it is required, in order to charge an indorser of a note, that a suit shall be previously commenced against the maker, and be prosecuted with effect in the county where the maker resides; and that no such proceedings have been had in this case.

If the defendant is liable, in this Commonwealth, he is to be

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E. D. Sohier and *Welch*, for the respondent, cited *Walker* v. *Leighton*, 11 Mass. 140. Rev. Sts. *c.* 96, § 8.

Shaw, C. J. Without going into the evidence whether this judgment was rendered by accident or mistake, the court are of opinion, that if the action were reinstated, the petitioners could not have the benefit of the set-off. The action is by E. M. P. Wells, on a promissory note, against Ira Warren and Silas Warren, the former principal, the latter surety. The account proposed to be given in evidence, by way of set-off, is an account by Ira Warren against one McAllister, for whose benefit it is alleged the suit is brought.

In regard to the latter point, it is provided by the Rev. Sts. *c.* 96, § 11, that if a suit is brought by one person in trust, or for the use or benefit of another, the defendant may set off any demand against the person for whose use the suit is brought. It is admitted by the plaintiff, that the suit is brought for the use of McAllister, and therefore, in that respect, the set-off would be admissible.

But it is further provided, (Rev. Sts. *c.* 96, § 8,) that if there are several defendants, the demand, proposed to be set off, shall be due to all of them jointly, with some exceptions as to dormant partners, not affecting the present case.

It would at first seem, that when, though there are two defendants, one is principal and the other surety, a debt due from the plaintiff to the principal would be within the reason and equity of the statute. But the contrary was held in *Walker* v. *Leighton*, 11 Mass. 140. And the words of the revised statutes, as above cited, are precise and explicit. And from the report of the commissioners, we have no doubt that they are so intended to be. And the rule is founded on this consideration; that the plaintiff may have a several demand against such principal, which he could not include in his suit against both defendants, and which he reserves to meet the several defendant's demand, whenever he shall offer it.

But the Rev. Sts. *c.* 90, § 50, have provided another remedy, calculated to do justice to parties having mutual demands, where the parties are not the same. They provide for the set

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WILLIAM J. HUBBARD & others, Executors, *vs.* CORNELIUS COOLIDGE.

This writing, "I agree with A. to give up his note for the W. stock, and allow him in account the sum paid thereon, depending on his exertion to free me from that concern without further loss," constitutes a conditional promise; and the acceptance thereof by A. is an undertaking by him to use his exertion, &c. on request. Such promise is on a sufficient consideration, if, when it was made, there was a possible liability of the promisor to further loss from the concern mentioned.

ASSUMPSIT on several promissory notes given by the defendant to John Hubbard, the plaintiffs' testator, and on several items of account. The defendant filed an account in offset; and the principal controversy, at the trial before *Wilde*, J. (so far as it relates to the question now brought before the court,) was respecting a written promise of the testator, hereinafter set forth. (*p.* 89.) The evidence as to this promise was as follows. On the 22d of May, 1828, the said testator and the defendant made a written agreement, reciting that three houses in Chesnut Street, and one house in Cedar Street, and eighteen shares in the Boston and Canton Manufacturing Company were held by said testator as the joint property of himself and the defendant, and stating it as agreed, (*inter alia*,) that the accounts of Chesnut and Cedar Street purchase should be settled, made up to June 30th that the testator should take to his own account the three houses in Chesnut Street, at $9,000 each, value, June 30th; that the defendant should take to his own account eighteen shares in the said manufacturing company, and thirty-four and a half shares in the Ware Manufacturing Company, at $500 each, and give his note therefor, payable at or within two years from October 1st, 1828, with interest after, and transfer said shares to said testator as collateral security for said note; the defendant reserving to himself the right to sell or exchange said shares, giving the testator equal security.

In pursuance of this agreement, the testator transferred the said shares to the defendant, who gave his note of $26,250 therefor, dated May 23d, 1828, and transferred them, as security, to the testator.

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Prior to April, 1829, the Canton Company began to be so far embarrassed as to threaten the stockholders with individual liability for their debts. The testator was absent at that time from the United States, and Samuel Hubbard, Esq. was his attorney. The testator returned in May, 1829. There was an attempt to raise money from the stockholders, by voluntary contribution, to pay the debts of said company, and the testator paid $15,000 for that purpose. But it was found to be impossible to raise a sufficient sum, in that way. An attempt was afterwards made to organize a new company, to be called the Canton Manufacturing Company, in which the defendant, (by virtue of the $15,000 which the testator had paid, and the further sum of $35,000, which he had agreed to pay, to be applied to the payment of the debts of the old company,) would be entitled to, and agreed to take, one hundred shares, which it was agreed he should take in his own name, and mortgage to the testator to secure the aforesaid note of $26,250. It was further agreed, that the defendant should give a new note for $32,000, part of the $50,000 advanced and to be advanced by said testator, who had discharged the defendant from $18,000, the balance of said $50,000; but the shares were to be so held as not to involve the testator in any liability for the debts of the company.

The plan, however, of a new company was not carried into effect; and it was then proposed to sell the company property, and the defendant was employed for that purpose. To induce him to exert himself to effect a sale, Samuel Hubbard, Esq., in behalf of the testator, promised, in case a sale should be made by him, (acting wholly under said Samuel's directions in the negotiation,) to give up to him his note for $32,000; and also his notes, given from time to time, as that sum had been paid by the testator, for the $50,000, and to indorse on his note for $26,250 so much as related to the Canton shares, which was $9,000; and to release an attachment made by the testator on the defendant's property; and to apportion the $50,000 paid on forty shares.

By means of the defendant's exertions, a sale was afterwards made, and the conditions aforesaid were complied with. The notes aforesaid were given up, and $9,000 indorsed on the note

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of $26,250, by William D. Sohier, Esq., with whom it was deposited, by agreement of the parties, in order that the indorsement might be made when the condition should be fulfilled. The note remained in said Sohier's hands until September 29th, 1832, no suggestion having been made to him by the defendant that he (the defendant) was entitled to any indorsement or allowance thereon besides the said sum of $9,000.

In July, 1829, the defendant failed in business, and on the 15th of that month he transferred to the testator sundry equities of redemption, the agreed value of which, viz. $6,459, was indorsed on the note of $26,250.

The Ware Manufacturing Company became embarrassed in 1829, so as to alarm the stockholders concerning their individual liability for the debts; and the testator requested the defendant to receive a transfer of the thirty-four and a half shares held as collateral security as aforesaid, which the defendant declined to do, unless the testator would give up the note which he held for said shares. The testator ultimately agreed to give up said note, and the defendant received a transfer of the shares. The note, however, was not given up; for the reason, as assigned by the testator, that the accounts of the company were not closed, so as to relieve him from liability. On this point of the case, the clerk and treasurer of the Ware Company, a witness called by the defendant, testified that the largest debts, due from the company in 1829, were incurred prior to 1828, and that the others were renewals of previous debts also contracted prior to that year; that about the 17th of May, 1830, John Hubbard (the testator) requested him to record a transfer of thirty-four and a half shares to the defendant, being all which said testator then held. The witness did not record it, because the defendant had not requested it to be done, and it was a regulation of the company that no transfer should be made without consent of the transfer committee. On the next day, the testator and defendant were in the office of the witness, and the testator requested the defendant to take the transfer; and the defendant saying that the shares had been transferred to the testator as collateral security, and that he had promised to protect them, but that he would take the transfer if the testa

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tor would give him up his note; and that then he should lose his shares and all he had paid on the note. The testator said he would give up the note when he should be free from all assessments. A note of the company for $40,000 was then to fall due in a few days. The transfer was made and left, with a written demand of the defendant on the witness to record it.

The same witness further testified that the debts of the Ware Company were all paid on the 12th of June, 1830, and the stockholders discharged from liability; that the testator never paid any assessment after the spring of 1829; that the defendant's exertions for the company were considered equivalent to the claim of the testator; that the defendant told the witness that the testator offered him a written obligation, and that he declined to receive it, considering his word as good as his bond. On cross-examination, the witness testified, that since this suit was brought, the defendant told him that the day the paper hereafter mentioned was signed he went to Nahant, and the testator, on meeting him, thought he looked uneasy, and asked him what was the matter; that the defendant replied to him that he felt badly, and was dissatisfied because the testator had not kept his word with him about the note, and had not given it up as he had agreed to do; that he saw no encouragement for him to exert himself under such circumstances; that the testator thereupon said he had never changed his original purpose, and was then ready to give the defendant an obligation to do it; and that they both went into a house, and the paper was then and there executed, by which the testator agreed to give up to the defendant his note for the Ware stock, and allow him in account the sum paid thereon at the time of his failure, &c.

It was proved that the defendant, on the 11th of June, 1830, sent a letter to the testator, informing him that the Ware concerns were all closed.

The plaintiffs' counsel yielded all claim to the note for $26,250, but resisted the defendant's demand to be repaid on settlement the sum indorsed on the note under date of July 15, 1829, on the ground that there was no consideration for the promise, and also on the ground that the promise was given un-

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der a mutual mistake, or procured by fraud; the intent being to execute the previous verbal agreement only.

The defendant's counsel argued, that no consideration was necessary to support this claim, it being in the nature of a voluntary settlement of accounts. The judge ruled that a consideration was necessary to support the promise.

The plaintiffs' counsel argued that there was no consideration, because the words in the paper, "free me from that concern," related to the Ware Company, which had been settled, and the testator discharged from all liability, in the month of June preceding.

The defendant's counsel argued, that as the Ware Company's affairs were closed, the Canton Company was intended; but the plaintiffs' counsel insisted that the terms of the contract plainly referred to the Ware Company concern, and that no evidence appeared that the testator knew that the Ware Company's debts were settled.

The judge instructed the jury that there was no evidence of misrepresentation or mistake, as, notwithstanding the previous verbal bargain, the parties might have agreed to vary it afterwards; and that as to a want of consideration, the paper appeared on the face of it to refer to the Ware Company; but as the defendant had sent a letter to the testator, informing him that the Ware concern was closed, it might be inferred that the Canton Company was intended, unless, as suggested by the plaintiffs' counsel, the jury believed that the testator had forgotten that fact.

The judge left it to the jury to say whether there was any consideration or misrepresentation, and instructed them that if there was a consideration, a mere mistake on the part of the testator would not avoid the contract, unless it appeared that he had been misled by some misrepresentation of the defendant.

The jury returned a verdict for the plaintiffs, for $6,742·65, having rejected so much of the testator's promise, made in August, 1830, as without consideration.

The defendant moved for a new trial, on the ground that the verdict was against the evidence, and because the judge ruled that a consideration was necessary to support the promise to allow in account the sum paid on the $26,250 note.

Dexter, for the defendant.

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Choate and *W. J. Hubbard*, for the plaintiffs.

PUTNAM, J. It is admitted that the jury have not allowed to the defendant the amount of money which he paid on the note for $26,250, on the 15th of July, 1829, according to the agreement made at Nahant in 1830; and the reason given for the disallowance is the want of consideration for so much of the agreement. The plaintiffs deny that the sum of $6,459, which was paid by the defendant and indorsed on the note, was ever intended to be credited. But they allow the agreement, so far as it concerns the giving up of the note itself. The agreement is in the words following, "Nahant, August, 1830. I agree with Cornelius Coolidge to give up his note for the Ware stock, and allow him in account the sum paid thereon, at the time of his failure; [intending to put him in the same situation in respect to the Ware stock, that Mr. S. Hubbard has placed him in relation to the Canton stock] depending on his exertion to free me from that concern without further loss, and that nothing is to be said to Mr. Sturgis, or any one, till the settlement of accounts. John Hubbard."

It has been deemed important to determine whether the future services of the defendant were to be rendered, upon the notice and request of Mr. Hubbard, to the Ware concern or the Canton concern. On the part of the plaintiffs, it is contended that they related to the Ware concern, which had been fully settled; and so that no services of the defendant would ever be wanted or required, and therefore that there was no consideration to Mr. Hubbard for the engagement to repay the money which the defendant had paid upon the Ware stock note. And we are inclined to the opinion, that the intent of the parties was, that the defendant's exertions were to be rendered in relation to the *Ware*, and not in relation to the *Canton* concern.

The subject of the agreement was the note which the defendant had given for the *Ware* stock, which note the testator then held. The sum paid on account of that note was agreed to be repaid; and the situation in which the defendant was to be placed and left, in relation to the *Ware* concern, was explained by reference to a similar arrangement relating to the Canton

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concern, where the defendant was allowed the whole that he had paid upon it. The Canton concern is thus incidentally introduced, and if the words which I have placed between brackets be read as a parenthesis, it would be perfectly clear that the agreement related to the Ware concern.

The testator was to give up the defendant's note for the Ware stock, and allow him in account the sum paid thereon at the time of his failure, depending on his exertion to free Mr. H. from that concern without any loss, — reading the paper without the parenthesis. If that should be read afterwards, "intending to put the defendant in the same situation in respect to the Ware stock, that Mr. S. Hubbard placed him in relation to the *Canton* stock," it would, by way of reference, clearly indicate the terms of the agreement. Mr. S. Hubbard had allowed the defendant all that he had paid on the *Canton* stock, for the services which he had rendered to the testator relating to that stock. We proceed upon the ground that the services, which the testator depended upon, were to be performed in relation to the *Ware* stock or concern.

But it is argued for the plaintiffs, that the verbal agreement did not embrace the money which the defendant had paid upon the note for the Ware stock, but merely the note itself, which was agreed to be allowed, on account, when the Ware concern was settled; and that the plaintiffs are willing to give the defendant credit for *that* amount. It is true that the defendant considered that the Ware concerns were settled, and that he was entitled to have his note; but from some cause or other the verbal agreement was not carried into effect. The parties afterwards met at Nahant, and entered into the written agreement which is now under consideration. And it has been argued for the plaintiffs, that the writing was intended to include only what before had been verbally agreed; and that there was mistake or misrepresentation, or no consideration for the part of the written contract which exceeds what had been some time before agreed upon. It is not denied that there was a good consideration for that part of the agreement, by which the testator was to allow to the defendant, on account, the amount then due on the note; indeed there

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could be no foundation for such denial. The situation of the parties is to be taken into consideration. The testator had capital; the defendant had skill. The testator became a stockholder in the Canton and also in the Ware concern, and was apprehensive that his property would be lost or greatly impaired from his liability, as a stockholder, for the debts due from these several companies.

In this extremity, the services of the defendant were put in requisition. And so far as they related to the Canton concern, it is conceded that they were eminently adapted to the occasion. They were performed under instructions of Mr. S. Hubbard, (which were read at the argument,) and the testator was relieved from the Canton concern. And he was desirous that the defendant should do the same thing in relation to the Ware liability.

The testator would have transferred his stock to the defendant, without his consent. But to that the defendant objected, as soon as the testator's intent became known. The defendant would not assume the liability without some substantial reward. He undertook the risk and liabilities, at the earnest request of the testator, in consideration of having the amount due upon the note for his Ware stock allowed him on account. This makes the first part of the written agreement. It was not upon a *past consideration*, (which, technically considered, is for services performed without request, or a mere voluntary courtesy,) but upon services rendered upon request. And so far the plaintiffs admit that the agreement should be carried into effect.

But the last part of the agreement, that is, to allow the defendant the sum he had paid, and which was indorsed on the note, is controverted.

We are then to consider whether, from the paper itself, and the evidence, any consideration appears for it. The affairs of the Ware Company were represented by the defendant to have been settled at the time when he claimed of the testator the performance of his verbal agreement. But for some reason or other he did not comply with the request.

The parties afterwards met, and in a conversation the defend-

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ant complained that there was no inducement for him to exert himself in the testator's service, as that verbal promise had not been performed; and thereupon the testator professed a willingness to give his written undertaking. The parties then went into a house, and the result was, that the agreement now under consideration was made.

It must be recollected that the testator, at the time when the defendant called on him to give up the note, expressed an apprehension that notwithstanding he had transferred the stock, he might still be liable for assessments. The verbal agreement related to the services which the defendant had performed at the testator's request. And the defendant considered that the testator was relieved, and claimed the note. But the testator was apprehensive still. How could it be ascertained with certainty, that he was free from all future liability? Was it certain that no other creditors of the company would appear, and that no further claims, at least, would be made upon him, growing out of that disastrous affair? His desire was to secure the future services of the defendant, if there should be any necessity for them, and he expressed this reliance upon the defendant in the paper itself. It was accepted by the defendant upon the terms or condition expressed.

Was this giving something for nothing on the part of the testator? We think not. We cannot estimate, as the parties could, the benefit to one or the inconvenience to the other. The law does not nicely weigh the amount of benefit to one party, or injury or loss to the other, which will make a legal consideration.

Besides, it is to be recollected that the testator was known to be a man of great sagacity as well as of property. His connexion with the defendant, in matters of business or speculation, had been somewhat extensive. They dealt in large sums, and the amount which was to be allowed to the defendant was not a present payment of cash, but an item to be put to the credit of his account, which still remained open. Again, in regard to the benefit to the testator. He knew full well the eminent services which it would be in the defendant's power to render him, if

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there should be future claims upon him. It would have been extraordinary if he should not have desired to secure those services. The promise was, not to pay something for nothing, but something for services thereafter to be rendered, upon request, if the promisor should want them.

It is said, that the defendant has not rendered any services for the testator, since the agreement. If it be so, it does not appear that there has been any necessity for them, nor that any request has ever been made of him, or any denial by him to render any service. It was sufficient for him to wait until his services should be called for.

It is not material by which of the parties to an agreement the words are spoken, if the assent of the other appears. The intent is to govern. Thus if a man makes a feoffment in fee to one, *ad erudiendum* his son in such an art, that is a condition; and yet it is not spoken by the feoffor any more than by the feoffee; but the words purport the intent of the parties. Plowd. 142. So a grant of an annuity to one, *pro consilio impendendo*, is a grant conditional, and although there is not any word of condition in the case, yet it is all one as if the grant of the annuity had been upon a condition that he should give him counsel. Plowd. 141. And in such case if he will not give the counsel, the other may detain the annuity. See also *Dutton* v. *Poole*, 1 Vent. 318. Cowp. 443. 3 Bos. & Pul. 149, *note*. *Shepherd* v. *McEvers*, 4 Johns. Ch. 136.

It is not essential that the consideration should be adequate in point of actual value. It is sufficient, if a slight benefit be conferred by the plaintiff on the defendant, or on a third person, or if the plaintiff sustain the least injury, inconvenience, or detriment, or subject himself to any obligation without benefiting the defendant or any other person. Chit. Con. 7. It is not necessary that the mutual promise be directly proved, provided it be fairly presumed. 2 Evans's Poth. 22. (Philad. ed.). E. g. a promise of marriage, from the general tenor of conduct.

Now the agreement under consideration is very clear in its terms. The promise to pay, depending upon the defendant's exertion to free the testator from further loss, was in its nature conditional; and the acceptance of the writing by the defendant

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was an undertaking to comply with the terms therein expressed. If the testator had complied on his part, and taken up the contract, he would have had sufficient evidence, in the handwriting of the defendant himself, of his undertaking. The motive that influenced the testator plainly appears. The defendant had succeeded in relieving him from his connexion with the Canton concern, and he had allowed the defendant all that he had paid on that concern. He had effected the same desirable object also in relation to the Ware concern, so far as he knew or believed; the testator, however, did not feel entirely safe from future liabilities. Well founded or not, such appeared to be his doubt or suspicion. He therefore thought it best to secure the future services of the defendant, and agreed to place him upon the same ground in relation to the Ware concern, as he had been placed in regard to the Canton concern; and that arrangement could be effected only by crediting him with all the money he had paid on the note for the Ware stock, as well as with the note itself. We must presume, therefore, that the testator caused one of the motives which led to the settlement to be inserted in the writing, namely, that he depended upon the defendant's exertion to free him from the Ware concern without further loss. And the defendant accepted the agreement accordingly. Upon this consideration the agreement was executed and delivered. It is no answer to say, that the defendant's services might never be called for. He was *retained*, to say the least; and whether, if his services should be called for and rendered, they would prove more or less valuable to the promisor, or more or less inconvenient to himself, it is not material for us to determine. It was said, however, that this written agreement was made upon a *mistake*, or *misrepresentation*; but there is no evidence to prove it. It was made after the verbal agreement, embracing that and more; and it was made by individuals in every respect perfectly competent to weigh and understand the motives and reasons which led them to make it. And we think the jury, from the evidence in the case applicable to the agreement itself, were not warranted in rejecting the same as without consideration. A new trial is to be had, and the jury is to be instructed conformably to this opinion of the whole court.

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George Sparhawk & wife *vs.* Otis Bullard.

In a writ of entry to recover flats, where both parties claim under a common ancestor or predecessor, the demandant cannot prevail unless he shows that the flats demanded were assigned to the party under whom he claims, in the division of the ancestor's estate, or that a title has been acquired by disseizin. A mere possessory title, which would be good against a stranger, is not sufficient; for such a title may be acquired by a tortious entry.

A possessory title will not avail against the true owner of land, however long continued, unless the claimant has had such an open and exclusive possession as amounts to a disseizin.

For the purpose of establishing the location of demanded premises, grants of adjacent lands, between strangers, are admissible and relevant evidence.

When the proprietors of adjoining lots of land agree upon a dividing line between them, the presumption is, that it is the true line according to the original location of the lots.

An ancient location of flats adjacent to the flats demanded, by description in a deed between third persons, though unaccompanied by any open and notorious possession, will govern the line of the demanded premises, unless the party objecting can prove that the line ought to have been laid out in a different direction.

If a demandant shows that he, or those under whom he claims, had an actual seizin and possession prior to the tenant's entry, he is entitled to recover, although he may have no other title to the land than such possession, unless the tenant shows a better title in himself, or in those under whom he claims.

In the case of a grant of land with the flats belonging thereto, the tenant may show what flats belonged to the land, or that the demanded premises were not included in that grant.

The rule laid down in the case of *Rust* v. *Boston Mill Corporation*, 6 Pick. 158. for the division of flats in a cove, among conterminous proprietors, recognized and confirmed.

A creek in which the sea ebbs and flows, and from which the tide does not ebb entirely, is a boundary beyond which the owner of flats cannot recover.

Under the colonial ordinance of 1641, the ebb of the tide, when from natural causes it ebbs the lowest, and not the average or common ebb, is to be taken as the low-water mark.

This was a writ of entry *sur disseizin*, brought to recover a parcel of land, formerly flats, but now reclaimed from the sea, situated in a cove at the southerly part of Boston, near the junction of Washington and Pleasant Streets. The demandants claimed the premises as appurtenant to an upland lot bounded on Washington Street, and made title through sundry descents, devises, and mesne conveyances, from Elder William Colbron, who died in 1662, leaving numerous issue to whom he devised his estate, after the decease of his widow No general division of said

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Colbron's estate was produced, but several partitions of portions of it among the different branches of his family, but not embracing distinctly the demanded premises, were exhibited; and it was satisfactorily proved by circumstances, that a general division was made about the year 1673, of which no record can be found. The demandants claimed under Thomas Powell and his wife, who was a granddaughter of Colbron; and the tenant claimed the premises as appurtenant to one or the other of two upland lots on Pleasant Street, which were shown to have been the property of Colbron, and afterwards of Mary Small and Sarah Colpit, who were also granddaughters of Colbron, and from whom the tenant made title. The demandants claimed so much of the flats owned by Colbron as would be comprehended between the side lines of the upland lot first mentioned, protracted in the same direction to low-water mark, and to run parallel with Castle Street, and of equal width from high-water to low-water mark. They relied on the ordinance of 1641, which provides that "in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to the low-water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further; provided that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels in or through any sea, creeks, or coves to other men's houses or lands." Ancient Charters, 148.

The demandants also relied on a supposed location by their predecessors, from which they derived an adverse possession of the demanded premises. To establish such a location, they offered in evidence office copies of a grant from the town of Boston to Samuel Phillips and others, in 1708, and an indenture of division between said grantees in 1709, containing the original laying out of Castle Street, which the demandants contended was the south boundary of Colbron's lands. The tenant objected to the admission of these deeds, as *res inter alios actæ*, but they were admitted in evidence. The demandants denied that the tenant had shown any title to the premises, and alleged that the flats, appurtenant to the upland lots of Mary Small and Sarah

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Colpit, lay in a different place and direction. The side lines of said lots, protracted in the same direction, would cross the lines claimed by the demandants.

The tenant, who was in possession of the premises, on which he had built a house, resisted the claim of the demandants, and denied that the flats appurtenant to Colbron's upland had ever been distributed among his devisees by metes and bounds, or that there was any location of the flats by the demandants' predecessors, or that there had been any adverse possession by them, as against the other tenants in common or their assigns. He alleged that all the flats which belonged to Elder Colbron were now to be divided and distributed *de novo ;* and that, upon such a division, the demanded premises would fall to the shares of Mary Small and Sarah Colpit, or one of them, and would not fall to the share of Powell and wife ; in which last case, the tenant's title by possession would be sufficient for his protection.

The tenant also alleged the existence of an ancient natural creek, in which the tide ebbed and flowed, and which separated the demanded premises from the upland lot of the demandants. This was denied by the demandants, and the facts respecting the existence and dimensions of the creek were submitted to the jury by *Morton*, J., who tried the cause, under the same instructions that had been given by *Shaw*, C. J., in a former trial of the same question, namely, that " if they should find there was naturally and originally any creek in which the tide ebbed and flowed, and from which it did not ebb entirely at the time when, from natural causes, it ebbed the lowest, this would constitute a boundary of the flats, beyond which the demandants were not by law entitled to recover." The verdict negatived the existence of such a creek, and the tenant excepted to the instructions, and contended that the average or ordinary ebb of the tide ought to be taken as the line of the creek, and not the lowest ebb of the spring tide, which was the effect of the instructions. All questions of law and fact arising out of the deeds and other assurances on both sides, which were very numerous, * going

* The number of deeds and other documents, read and commented on by both parties, was more than one hundred. Among them was the following ex

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back nearly to the time of the first settlement of Boston, were, by agreement, submitted to the consideration and judgment of the court. The arguments of the counsel for each party were very elaborate, but were principally on the construction of the documents, and the comparison of boundaries and titles.

On the point that the flats ought to be divided proportionally among the proprietors of the upland lots, and as to the mode of division, the tenant's counsel cited the case of *Rust* v. *Boston Mill Corporation*, 6 Pick. 158.

On the point respecting the instructions relative to the creek, they cited the colonial ordinance of 1641, and Hall's Rights in Sea-Shores, 3, 16, 17. *Lord Fitzwalter's case*, 1 Mod. 105. *Rogers* v. *Jones*, 1 Wend. 237, 256, 258. *Miles* v. *Rose*, 5 Taunt. 705. *Ward* v. *Creswell*, Willes, 265. *Commonwealth* v. *Chapin*, 5 Pick. 199. *Gould* v. *James*, 6 Cow. 369. *Rex* v. *Ward*, 4 Adolph. & Ellis, 384.

The counsel for the demandants, as to the latter point, cited *Storer* v. *Freeman*, 6 Mass. 435. *Commonwealth* v. *Charlestown*, 1 Pick. 180; and as to the admissibility in evidence of the grant to Phillips and others, and the indenture of division made by them, 1 Stark. Ev. 52, 53.

Choate and *Bartlett*, for the demandants.

S. Hubbard and *C. P. Curtis*, for the tenant.

WILDE, J. The land demanded in the present action is a parcel of flats, situate in or near a small cove towards the southerly part of this city, on the westerly side of Washington Street, which, previously to the year 1662, belonged to the estate of

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tract from the town records, which Mr. Curtis, one of the tenant's counsel, supposed was the origin of the reservation of Boston Common. It has been supposed by some that the original reservation was by Blackstone, the first proprietor of the peninsula, now the city of Boston.

"At a meeting of Elder Elliot, Elder Penn, Mr. Thomas Clarke, Thomas Marshall, Jeremy Houchin, and Anthony Stoddard, 30th 1st mo. 1640.

"Also agreed upon y^t^ henceforth there shall be no land granted eyther for house-plott or garden, to any person, out of the open ground or comon field wch is left between y^e^ centry hill & Mr. Colbron's end, except 3 or 4 lotts to make up y^e^ streete from Br. Rob't Walker's to the Round Marsh."

The street here mentioned is Boylston Street, formerly Frog Lane. Centry Hill was afterwards known as Beacon Hill, which formerly stood in rear, or north of the State House.

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one William Colbron. By his last will and testament, which was proved and allowed in 1662, he devised one fourth of his estate to his daughter Sarah Peirce, and her daughter Sarah Colpit; three eighths to his daughter Mary Turell and her five children by John Barrell; and three eighths to his daughter Elizabeth Paine, and her children by Moses Paine. No deed of partition or division of the lands devised, between the devisees, has been discovered. But it is admitted that such a division was made, as the devisees conveyed different portions of the land in severalty; and it must be presumed, nothing appearing to the contrary, that these conveyances were made conformably to their respective rights and titles derived to them from the partition.

The demandants derive their title from one of the heirs of the said Elizabeth Paine. By a deed of partition, made in 1697, the shares of her children and heirs were divided, and set off to them, in severalty. The first lot was set off to William Paine; the next lot northerly of William Paine's lot was set off to Thomas Powell and his wife Margaret; and the next lot northerly was set off to Thomas Walker and his wife. The demandants' title is derived, by sundry conveyances, from Thomas Powell and wife; and the general question to be decided is, whether their lot was so located as to include all or any part of the flats demanded. There is no question as to the upland included in this lot by the deed of partition; and the demandants claim all the flats below, from high-water to low-water marks, and of an equal width throughout.

This claim, it is contended, is sustained by the opinion of the court in the case of *Mary S. Jackson* v. *The Boston and Worcester Rail-Road Corporation*, which depended on the same title. But that opinion was founded on a misapprehension of some of the facts which have been satisfactorily proved in the present case. One of the deeds, under which the tenants claimed in that case, was not produced; and the opinion of the court was predicated on the supposition that the tenants had not traced back their title to Colbron's heirs. But this supposed defect in the evidence was supplied, and the tenant's title under those heirs was made

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to appear, on an application by the tenants' counsel to stay the judgment, which was stayed accordingly. The same title has been proved in the present case. Both parties have deduced their titles from the heirs of Colbron; and the demandants are not entitled to recover, unless they have shown that the flats demanded were assigned to the party under whom they claim, in the division of the Colbron estate among his heirs, or that they, and those from whom they claim, have acquired a title by disseizin. It is not sufficient to prove a mere possessory title which would be good against a stranger; for such a title may be acquired by a tortious entry. If a party should enter upon a lot of land, under a deed to him from a person not seized, and having no title to the land, he might nevertheless by his entry acquire a lawful possession as against a stranger having no title. And if a stranger should enter and dispossess him, he might maintain a writ of entry against him to recover possession. But such a possessory title would not avail him against the true owner, however long it might have been continued, unless he had such an open and exclusive possession as would amount to a disseizin. It is necessary, therefore, for the demandants to show, that by the division of the Colbron estate among his heirs, and by the subsequent division by the heirs of Paine, the flats demanded were included within the lot assigned to Thomas Powell and wife, from whom they derive their title; or that they have acquired a title by disseizin.

In order to ascertain the southerly line of the Colbron estate, and to prove that the flats demanded were included within the demandants' lot, in the division between the heirs of Colbron, and the subdivision between the heirs of Paine and his wife, a deed of an adjoining tract of land from the town of Boston to Phillips and others was offered in evidence, to the admission of which the tenant's counsel objected. But we are of opinion, that this evidence is competent and relevant. When the dividing line between two lots is the subject of controversy, the descriptions of both lots are to be considered. And if land be conveyed, as it was in this case, bounded by the line of a prior grant, evidence to prove that the respective owners agreed upon

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the dividing line, is competent, and would be conclusive, if not opposed by other evidence, as to the original location of the lots. The land conveyed to Phillips and others, was, soon after the grant, divided between the proprietors in severalty; and by the deed of partition, it appears that a new highway, called Castle Street, was laid out across the neck of land on the northerly side of their lot, and that the lot next adjoining on the south was set off to Stephen Minot, and was laid ought on a straight line, bounded by said way from low-water mark easterly to low-water mark westerly, across the neck. And it is recited in that deed, that the land thereby divided was bounded northerly by Daniel Epes on the westerly side of Orange Street. Recitals in ancient deeds are always competent evidence, and are presumed to be true, unless the contrary can be made to appear. This evidence is satisfactory to show that Daniel Epes's lot was bounded southerly by Castle Street. That lot, in the division among the heirs of Paine and wife, was assigned to William Paine, who afterwards conveyed it to the said Epes. This lot was laid out on the southerly side of the Colbron estate. The north line of Castle Street, therefore, must be considered as the south line of that estate. This is unquestionably true as to the upland; for this lot, and the lot assigned to Minot, have been occupied up to Castle Street, ever since; and these lines have never been disputed. A line thus established, and acquiesced in for such a length of time, must be considered as the true and original line of division between the two lots, unless the contrary can be proved by strong and incontrovertible evidence. We think no such evidence has been adduced in the present case.

It has been argued, that as the lot assigned to William Paine, as now occupied, bounded southerly by Castle Street, is a few feet wider on Washington Street, and a few feet narrower at high-water mark, than it was according to the measure given in the partition deed between the heirs of Paine and wife, it is to be presumed that the north line of Castle Street was a conventional line, established by the owners of the two lots adjoining the street, and was not the original line of the Colbron estate But we think there is no sufficient ground for such a presumo-

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tion. When the proprietors of two adjoining lots agree upon a dividing line between them, the presumption is that it is the true line according to the original location of the lots. And there is nothing in the present case to rebut such a presumption. It is not improbable that when the partition was made between the heirs of Paine and wife, the southerly line of the Colbron estate was not ascertained with perfect accuracy, and that after the grant to Phillips and others, the true line was ascertained and established. We therefore conclude that the northerly line of Castle Street is to be taken as the southerly line of the Colbron lot, and that it is to be continued in the same direction to low-water mark. The lot of Stephen Minot was laid out in that direction over the flats; and such an ancient location is entitled to great consideration, and is not to be disturbed, unless it can be proved that it ought to have been laid out in a different direction. No such evidence has been produced, and there is no reason to doubt that the location was made in conformity to the respective rights of the parties. The lots southerly of Minot's lot are, as we understand, located in a similar manner, by lines parallel with Castle Street, so that the evidence is quite satisfactory to prove that these locations were rightly made, and that the lines dividing the flats were extended in a proper direction.

The south line of the Colbron estate being thus ascertained, the demandants contend that in the division of that estate, Moses Paine and wife, or their heirs, took all the flats in front of the upland, assigned to them in severalty, bounded northerly by a line parallel with Castle Street. But this claim is not sustained by the evidence. The only inference to be drawn from the conveyances by the heirs of Colbron is, that the flats were not divided by any particular location. No lines dividing the flats are designated. The upland only was divided; the flats being left to be distributed according to law, each party being entitled to his due proportion of them as his purparty, or as incident to the part of the upland assigned to him in severalty by the deed of partition. The flats belonging to the demandants' lot are not located. The south line of William Paine's flats is designated and established by the evidence; but the north line of his flats

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and the other lines of the flats belonging to the other heirs of Moses Paine and wife, are indefinite. The parties holding under titles derived from the other heirs of Colbron have as good a right to the flats in front of their lots, as the demandants have to theirs. But as these claims interfere, the conclusion is that the flats must be divided so as to give to each party his just proportion.

But it is objected by the demandants' counsel, that by a division of the flats according to law, no part of the flats demanded can be included within the tenant's lot, and therefore he cannot set up a title in a third party under whom he does not claim, to defeat the demandants' title. This objection would be well founded, if the demandants had shown that they, or those from whom they derive title, had an actual seizin and possession, prior to the tenant's entry. For if A. enters on the land of B. and disseizes him, and afterwards C., without right, enters on A. and ousts him, A. may maintain a writ of entry *sur disseizin* against C., and C. cannot set up the title of B. in defence, unless he claims under him or was in by his permission. But the evidence in the case does not allow the demandants to avail themselves of this principle of law. They have had no actual possession of the flats. The possession proved is constructive, and is limited to their right. They have acquired no title by disseizin. And it is competent for the tenant, in all cases, to prove that the demandant was never seized, either of the whole or a part of the demanded premises. For if it appears that the demandant was never seized, he is not entitled to maintain his action. Now when Powell and wife entered, under the deed of partition, upon the upland assigned to them, they became seized of all the flats belonging to that lot, and of no more. The tenant therefore has a right to show what portion of the flats demanded, if any, belonged to their lot. To determine this, it is necessary to ascertain the true line dividing the flats at the northern extremity of the cove. And this line we have found it exceedingly difficult to ascertain with entire satisfaction. The demandants have attempted to ascertain it, by establishing the south line of "the common" belonging to the town; and for this

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purpose they gave in evidence the copy of a vote of the town in 1794, granting sundry lots to certain proprietors of rope-walks, reserving, however, a strip of land, sixty feet in width, on the southerly side of the common, for a road from Pleasant Street to the channel. Grants to the said proprietors were made accordingly. This street was to be run parallel with Beacon Street. But the lines of Beacon Street, as they existed in 1794, have not been ascertained, by reason of alterations since made, and the loss of the plan and survey of the lots granted by the town. The parties therefore rely respectively on the northerly and southerly lines of occupation of the lots adjoining the new street, as evidence of their original location. But these lines do not coincide; and which, if either of them, corresponds with the original location, is left wholly uncertain. Neither of them corresponds with the lines dividing the flats southerly, as they are now occupied. Amid these conflicting lines, there being no monuments to refer to, it is impossible to ascertain the location of this street.

We are in the next place to consider the evidence, offered by the demandants, for the purpose of ascertaining a line further southerly. The first deed relied on is one from George Tilley to Christopher Tilden, dated August 28th, 1744. The land conveyed is bounded easterly on Pleasant Street, and there measures 387 feet; southerly on land of John Cornish, and there measures 145 feet, and so down to low-water mark; westerly by the sea or salt water, and there measures 410 feet; northerly on the land of the said George Tilley, and there measures 96 feet, down to the fence; and from thence on the same line down to low-water mark. By this description, it appears that the northerly and southerly lines of the lot are not parallel, the lot being 23 feet wider at the sea than it is at the street; and the question is, which line, if either, is to be considered as the line in conformity to which the line at the northern extremity of the cove is to be extended.

It was argued for the tenant, that the southerly line, if either, is to be presumed to be the true line. But this line, as appears by the plan, is within the cove, and cannot be the true line of

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division between the Colbron heirs, unless there was a location of the flats by that division; and that there was no such location must be inferred, as before remarked, from all the conveyances of hose heirs. But the northern line of the Tilley lot is very nearly, if not exactly, at the northern extremity of the cove. To this line it is objected, that Tilley owned the land on both sides of the line, and so might carve out and convey any part of his estate by such lines as he saw fit. The answer to this objection is, that the northerly line of the lot conveyed by Tilley to Tilden is in fact the northerly line of the Dinely lot; and this we think satisfactorily appears from the evidence.

The lot mortgaged to Tilden, and afterwards conveyed to Jonas Clark, was purchased by Tilley from the executors of Elisha Cook, who derived his title from Dinely; and was bounded southerly by land of John Cornish, and northerly by the land of David Colson. It is true there is a small variance in the description of the lot in the deed from the executors of Cook to Tilley, and in that contained in the deed from Tilley to Tilden. In the former deed, the line at the sea is said to measure six feet more than the same line is said to measure in the latter deed, and the line at the road seven feet less. If this were the true measure between the lots of Cook and Colson, it is obvious that the dividing line would extend six feet further north at the sea than it does by the deed to Tilden, and the course of the line would vary from all the other lines. The measure of lots, however, is not to be depended upon; and it may be presumed that the measure of the lines at the street, and at the sea, in the deed from the executors of Cook to Tilley, was incorrect, and that the errors were corrected before the conveyance to Tilden. By the deed to Tilden, the northerly line is described as "measuring ninety-six feet down to the fence, and from thence on the same line down to low-water mark." And by the deed from Colson to Tilley, it appears that his lot was fenced in. The fence, therefore, referred to in the deed from Tilley to Tilden, may be presumed to be on the dividing line between the lots purchased of the executors of Cook and Colson, and it is probable that by reference to that fence as a boun

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dary, the measure of the lines at the street and at the sea was corrected. After the mortgage of this lot to Tilden, Tilley conveyed it to Jonas Clark, who conveyed it to his daughter, Mary Minot. It was again conveyed by Stephen Minot to Joseph Waldo, and by him conveyed to William Powell. All these are ancient conveyances, and in all of them the description of the lot is the same. We think, therefore, there is sufficient reason to presume that this is the true description of the lot, as it was held by Fathergone Dinely, from whom Elisha Cook derived his title.

Another argument in favor of adopting the north line of the Dinely lot, as described in the deeds from Tilley, is that it agrees, very nearly, with all the side lines of the lots northerly, up to the street at the bottom of "the common"; and these lines are very nearly at right angles with the general course of the shore northerly of the cove. Now if these lines were not established with sufficient certainty, the correct method, by which these flats to the north of the cove should be divided, would be to draw a straight line according to the general course of the shore at high water, and from this line to extend the side lines of the several lots in a direction at right angles with the shore line. And by this method the flats might be divided with sufficient accuracy for all practical purposes.

These considerations seem to be sufficient to establish the north line of the Dinely lot, as the north line of the flats within the cove; and this view of the question is confirmed by another consideration. It appears, by the plans in the case, that the north line of the Dinely lot is at the northern extremity of the cove. The line of the shore there, at high-water mark, begins to incline further easterly; all the flats, therefore, lying between this line, in whatever direction it ought to be extended, and the north line of Castle Street, are within the cove, subject to division according to the rule of law in such cases established. Hence it follows, that the present parties, and all the proprietors of the flats within the cove, have a common interest in extending the line northerly, as far as may be; for if the line should be drawn parallel with the south line of the Dinely lot,

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which is the north line of the tenant's lot, or with the line of occupation of the ropewalk lots, the quantity of flats to be divided within the cove would be less than it would be if the line were extended in the same direction of the north line of the Dinely lot. The tenant, therefore, cannot be injured by the adoption of the latter line as the true line of the cove. For if he or Ephraim Marsh, from whom he derived his title, has acquired a title, by disseizin, to the flats conveyed by Cornish, it would be indifferent to them in what direction the north line of the flats within the cove might be extended; but the disseizin of any of the proprietors cannot affect the division. If Marsh has acquired any title by disseizin, that can only affect the proprietors of the Lowell lot, but cannot interfere with the demandants' lot.

No injustice, therefore, can be done to any party, by taking the north line of the Dinely lot, as designated in the conveyances from Tilley to Tilden and others, as the northerly line of the flats within the cove. And consequently all the flats situated between this line and the north line of Castle Street, extending to low-water mark, are to be divided among the conterminous proprietors, according to the rule laid down in the case of *Rust* v. *The Boston Mill Corporation*, 6 Pick. 158.

This division being made, the demandants will be entitled to recover the portion of flats belonging to their lot, and no more; for, of the residue of the flats demanded, they have proved no seizin either in themselves, or in those from whom they have derived their title.

A question was made at the trial respecting the existence of a creek, which was alleged to have separated the land demanded from the upland and flats belonging to the demandants. This question was submitted to the jury, who were instructed that if they should find there was naturally and originally any such creek, in which the tide ebbed and flowed, and from which it did not ebb at the times when from natural causes it ebbed the lowest, this would constitute a boundary of the flats, beyond which the demandants would not by law be entitled to recover. The jury found a verdict negativing the existence of such a creek; and the tenant's counsel excepted to these instructions.

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The court are of opinion that the exception cannot be sustained. The object of the ordinance of 1641, from which the right to flats originated, was to give the proprietors of land adjoining on the sea convenient wharf-privileges, to enjoy which, to the best advantage, it is often necessary to extend their wharves to low-water mark at such times when the tides ebb the lowest. 6 Mass. 438. We think therefore that the instruction to the jury on this point was correct.

A survey of the flats within the cove is to be taken, according to the principles now established, in order to ascertain the portion which the demandants are entitled to recover; which being done, judgment will be accordingly for the demandants.

George W. Little *vs.* George B. Rogers & another.

Under the *St.* of 1826, *c.* 27, § 5, and the Rev. Sts. *c.* 35, § 4, the maker of a note, payable to his own order and by him indorsed, is a competent witness, in a suit against him by the first indorsee, to prove the defence of usury.

The inception of such note is upon its indorsement; and therefore where, in a suit thereon by the first indorsee, the jury were instructed that if they believed it was usurious in its inception, they should deduct the forfeiture of threefold the interest reserved, the instruction was held to be right.

Assumpsit against the makers of a promissory note for $1000, dated December 20th, 1835, payable in six months, without grace, to their own order, and by them indorsed to the plaintiff. The note was afterwards indorsed by the plaintiff, and then by Charles Haynes.

The defence at the trial before *Wilde*, J. was usury; and it appeared from the testimony of George B. Rogers, one of the defendants, that the note was made on the 30th of April, 1836, but was antedated to make it appear more like a business transaction; that the defendants received a loan, on the note, of $900; and that the note was made by them for the purpose of raising money, and was not given in payment for merchandise, or other articles. It appeared also that the loan was effected by said Haynes.

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The plaintiff objected to the admission of the testimony of Rogers, because the suit was not between the original parties to the transaction; but the judge overruled the objection. The plaintiff also insisted that the defence of usury could not be maintained in this suit, because it did not appear that the plaintiff received any usurious interest; but the jury were instructed, that if they believed the note was usurious in its inception, and was made for the purpose only of raising money, they should find a verdict for the plaintiff for the balance due on the note, after deducting the forfeiture of threefold the interest reserved. And for the purpose of ascertaining that balance, they were instructed to ascertain the interest due on the note from the time it fell due to the day of the verdict, and add to it the principal, and from the aggregate to deduct three times the legal interest from the time of the maturity of the note to the day of the verdict. The jury made this deduction, and returned a verdict for the balance.

New trial to be had, if the ruling was wrong, on either of these points; otherwise, the verdict to stand.

Brigham, for the plaintiff.

E. G. Austin, for the defendants.

SHAW, C. J. The first question in the present case is, whether George B. Rogers, one of the defendants, was a competent witness. The action is upon a promissory note, and the defence is usury. The action is brought by the plaintiff, as indorsee, against the defendants, as promisors. But the note was made by the defendants, payable to their own order, and by them indorsed to the plaintiff.

From this statement it is manifest, that the present plaintiff and the defendants stand in the relation of original contracting parties. The note, being made by the defendants payable to their own order, did not assume the character of a contract until it was indorsed to the plaintiff.* Such being the nature of the

* In the case of *Kinsley* v. *Robinson*, 21 Pick. 327, which was a suit by the indorsee against the drawer and indorser of a bill of exchange made payable to his own order, and by him indorsed, the defendant's counsel argued that the defendant was entitled, *as indorser*, to notice of non-payment by the acceptor, though the latter had no effects of the defendant in his hands. But the court

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contract and the relations of the parties, the case is within the statute authorizing a defendant to be a witness to prove the defence of usury. By the Rev. Sts. *c.* 35, § 4, and statute of 1826, *c.* 27, § 5, "it shall be lawful for the debtor, (the creditor being living,) to become a witness, and he shall be admitted as such, and the creditor, if he shall offer his testimony, shall also be admitted as a witness, together with any other legal evidence."

It is not necessary to decide, in the present case, whether, if an action were brought by any other indorsee than an immediate party to the original contract, the original parties to the contract, if living, might be introduced as witnesses. But it seems proper to remark, that the trial by jury has been substituted for the old trial by oath, under *St.* 1783, *c.* 55; and now the testimony of the debtor and creditor is to be received and considered by the jury, in connexion with any other evidence offered; and therefore the decisions upon the former statute, providing for a trial by oath, (*Putnam* v. *Churchill*, 4 Mass. 516. *Binney* v. *Merchant*, 6 Mass. 190. *Knights* v. *Putnam*, 3 Pick. 171.) by which it was held that the statute did not apply unless the parties to the original contract were also parties to the suit, would not be of much importance as precedents; and although the same terms, "debtor" and "creditor," are used, it might, perhaps, by a reasonable construction, intend those who were debtor and creditor in the original contract of loan, which is charged to be usurious. But in the present case, the plaintiff, being the first indorsee on a note payable by the defendants to their own order, in contemplation of law is the original and first contracting party, and stands in place of a promisee in ordinary notes, and therefore is the creditor. *Van Schaack* v. *Stafford*, 12 Pick. 565.

The other point turns merely on the correctness of the charge.

decided (on the same principle as in the text) that such a bill could be transferred and become a contract only by the drawer's indorsement; and that the rule, which dispenses with notice to the drawer, was applicable to that case, and not the rule which is applied to common indorsers.

This point is perhaps inferrible from the case, as reported. It was, however distinctly raised and adjudged.

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The plaintiff contended, that the defence of usury could not be maintained, because it did not appear that the plaintiff received any usurious interest; but the court instructed the jury, that if they found that the note was usurious in its inception, they must find a verdict with the threefold deduction. From this we are to understand, that the jury did find that there was usury in the inception of the note, and as the inception was upon the indorsement by the defendants to the plaintiff, the usurious interest was then reserved or taken by the plaintiff; and either would be sufficient to make it usurious. For the reasons already given, this was to be considered as a note first assuming the character of a contract when indorsed to the plaintiff, and if more than six per cent. was then reserved, the direction was right. Had it been indorsed by the plaintiff for the accommodation of the maker, and negotiated to a third person, upon a usurious loan, and afterwards taken up by the plaintiff, it would have presented a very different question. But there are no facts stated in the report to found such a case, and the finding of the jury is against this supposition. It is stated, indeed, in the report, that the loan was effected by Haynes, who indorsed the note subsequently to the plaintiff; but it does not appear that he had any other agency than that of effecting the loan, as a broker, from the plaintiff to the defendants.

Judgment on the verdict for the plaintiff, for the reduced sum

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David H. Ellery *vs.* Nathaniel F. Cunningham & another.

The mate of a vessel, that was lying at Mobile, found two bales of cotton floating in the river there, took them from the water, put them on board the vessel and brought them to Boston, where the owners of the vessel agreed with him to take the cotton into their possession, and to be accountable to him for it, if they could not discover the owner thereof. They sold the cotton soon afterwards, and no owner appearing, the mate, after four years, demanded a settlement, which was refused.

Held, that he was entitled to recover of them the proceeds of the sale.

Held also, that he could recover interest only from the day when he demanded an account, they being his factors, and being, under the circumstances of the case, in no default before that day.

Assumpsit to recover the proceeds of the sale of two bales of cotton. The parties submitted the case to the decision of the court upon the following facts: The plaintiff, in January, 1833, sailed from Boston to Mobile as chief mate of a vessel owned by the defendants. While the vessel lay at Mobile, the plaintiff and his brother, the second mate, while walking about the dock, on Sunday, saw two bales of cotton floating in the river, and with the assistance of persons hired by them for the purpose, they drew said bales from the river, and placed them on a wharf, where they remained for eight or ten days, until said vessel was about to sail, when they were put on the deck of the vessel, and brought to Boston. The second mate was paid by the plaintiff for his services, and claims no right to the cotton.

On the arrival of the vessel at Boston, in April, 1833, the cargo, specified in the cargo-book and bills of lading, was delivered to the defendants, these bales of cotton remaining on deck. The defendants told the plaintiff, that they would take the bales into their possession, and would send out the marks and numbers of them to Mobile, in order to discover the owners; and that if the owners were not discovered, they would account with the plaintiff for them. The plaintiff replied, that he was willing to give up the cotton, if the owners should be found; otherwise, he should hold the defendants responsible for it. The defendants answered, that they would be accountable to him for it, if no owner should be found, and thereupon took the bales into their ware-

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house. The captain of the vessel, on his next trip to Mobile, took with him the marks and numbers of these bales, and made inquiries for the owners, but could obtain no information concerning them; and he has since made three other trips to Mobile, but has never been able to ascertain the owners. No inquiries have ever been made of him, at Mobile, respecting this cotton. He claims no right to it.

On the 17th of April, 1837, the plaintiff called on the defendants and demanded an account and settlement; and they, after showing him their books containing an account of the sale of the cotton, offered him ten dollars, which he refused to take. The defendants, before action brought, never claimed any right to the cotton for themselves; nor have the owners of it ever been found. The defendants, in May, 1833, sold it for $ 112·45, deducting the charge for freight, and the expense of the sale, and the money has ever since been in their hands.

If, on these facts, and the inferences which a jury would be authorized to draw from them, the plaintiff is entitled to recover, the defendants are to be defaulted, and judgment to be rendered for the plaintiff; otherwise, the plaintiff to become nonsuit.

Paine was about to argue for the plaintiff; but the court desired the defendants' counsel to begin.

F. C. Loring, for the defendants, argued that the plaintiff could not recover, without proving his property in the cotton. His only title to it is that of occupancy. But property found on navigable water belongs to the sovereign, as a perquisite of the admiralty. *The Aquila*, 1 Rob. 38. Curtis's Adm. Dig. 209, *note*. 2 Kent Com. (1st ed.) 292. *Peabody* v. *Bags of Cotton*, 2 Amer. Jurist, 119. The admiralty has jurisdiction in such cases as this, and not the courts of common law. Abbott on Ship. 399. *Thackarey* v. *The Farmer*, Gilpin, 526. The court will judicially notice the situation of Mobile, to determine whether the waters of the river there are within the ebb and flow of the tide. *Peyroux* v. *Howard*, 7 Pet. 342. 1 Chit. Pl. (6th Amer. ed.) 252.

As this was a case of flotsam, the parties are entitled only to salvage, which none but a court of admiralty can decree. All

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the parties, including the defendants, are entitled to salvage, and cosalvors cannot sue each other. Besides, the defendants, as owners of the vessel, were by law in possession of the cotton, and had a lien on it for freight.

The proceeds of the cotton belong to the master of the vessel, though his servant rescued it from the water. Bac. Ab. Master & Servant, I. Reeve Dom. Rel. 343. 1 Comyn on Con. (1st ed.) 224.

Non constat, that the owners will not hereafter appear and claim of the defendants the proceeds of the sale. 2 Amer. Jurist, *ubi sup.* The promise of the defendants was without consideration.

Paine, for the plaintiff. Admitting, for the purpose of argument, that this is a case of salvage, yet the defendants are entitled to no part of it. The cotton was saved without any assistance of the vessel or the crew, and with no delay or risk. Nor was the plaintiff on duty when he found the cotton. Nor has the master any claim to the money as salvage. *Mason* v. *The Blaireau*, 2 Cranch, 240.

The plaintiff is to be regarded as a finder ; and as the second mate makes no claim to the property, no other person can interpose. 2 Bl. Com. 9. *Armory* v. *Delamirie*, 1 Stra. 505. *McLaughlin* v. *Waite*, 9 Cow. 670. *S. C.* 5 Wend. 404. The case does not show that the cotton was within the jurisdiction of the admiralty.

This is the case of a mandate, and the plaintiff might have taken the property from the defendants at any time. Story on Bailm. §§ 150, 151, 209. The defendants promised to account with the plaintiff if no owner should be found. A reasonable time has elapsed, and no owner has been found. The defendants sold the goods, and assumpsit lies to recover the proceeds. 1 Petersd. Ab. 140.

Shaw, C. J. The question as to what is the nature of the right of the finder of property lost or derelict, under the various circumstances in which it may be found, at sea or on shore, on the surface of the earth or buried beneath it, is often one of difficulty and nicety. In general, however, it may be said that the

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finder has a lawful possession, which none but the owner can question, and that possession gives him a special property sufficient to maintain trover against any one but the true owner. *McLaughlin* v. *Waite*, 5 Wend. 404.

But the court are of opinion, that none of the questions as to wreck, salvage, and the rights of joint salvors, arise in the present case. The plaintiff found the two bales of cotton floating in Mobile River, and with his brother, with some hired assistants, saved them, put them on board the vessel of which he was mate, and brought them home. As to the claim of the brother, the plaintiff paid him a valuable consideration for his equitable interest, and the brother makes no claim, and the plaintiff relies on an express promise to himself. The defendants were owners of the vessel, and after the cargo was discharged, they promised the plaintiff that they would take the two bales of cotton into their store, and would take measures to discover the owners, and if not discovered, they would account to him for the cotton. To this the plaintiff consented, holding them responsible to account to him, if the owners were not found; they assuring him that in that event they would be accountable to him for the cotton; and the two bales were taken by them accordingly. This was a clear and direct promise to account to the plaintiff on condition; and no owner appearing after the lapse of a reasonable time, we think the defendants are bound by it.

It is urged that it was a promise without consideration; but we think otherwise. The plaintiff, as finder, had a possession, and a possession very likely to be of considerable value to him, and a special property. Even as salvor, he had a valuable interest in it. The surrender of this possession was a legal and sufficient consideration for the promise.

It is said that the defendants, as owners of the vessel, were in possession of the property, at least, and had a lien upon it for freight, and that the plaintiff was not in possession. We do not so understand the case. The property was shipped on board by the plaintiff. The defendants, no doubt, had a lien for the freight, which could be discharged by payment of the freight, and which, no doubt, the plaintiff would have paid, but

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for the defendants' promise. Putting the property into their hands to sell and account for, superseded the necessity of any other payment of freight, because the sale enabled them to realize their freight, which they charged and deducted from the sale.

The defendants having received the goods from the plaintiff, and promised to account to him for them, have no right to question the plaintiff's title. Nor could they set up the title of any other person, unless they could show, that they had been legally obliged to surrender the property, or the proceeds of it, to some person having a title paramount to that of the plaintiff.

A question has arisen, whether the defendants are chargeable with interest from the time the cotton was sold. We cannot perceive any thing to take the case out of the usual rule, that in the absence of any contract or usage, which may be evidence of contract, a factor is not liable for interest until he is in some default. We think, therefore, that in the present case, where from the nature of the agreement it must have been understood that the property must remain some time to wait for the appearance of an owner, the defendants were in no default until the plaintiff demanded an account and settlement, which was the day before the action was brought, and is the time from which interest on the net sales is to be computed.

Defendants defaulted

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JOHN NUGENT *vs.* MICHAEL RILEY.

A lease for years by indenture, in which the lessor acknowledges the receipt, in advance, of a gross sum, in full for rent of the demised premises during the term, and in which the lessee covenants to reconvey the premises on payment of said sum and interest thereon, is a mortgage; and the rights and duties of the parties are like those of mortgagors and mortgagees of estates of freehold.

So of a lease prepared in such form, but executed by the lessor only; provided the lessee accepts it and takes possession under it.

In the latter case, there is no covenant, technically, on the part of the lessee, upon which an action can be maintained. But if he underlets the demised premises, and receives rent before the term expires, to the amount of the gross sum advanced by him, and interest thereon, his estate for years is thereupon defeated, and the lessor is immediately in of his old estate. All that the lessee receives above that amount, is received, not as mortgagee, but for the lessor, who may recover it of him in an action for money had and received.

THIS was an action of assumpsit commenced on the 15th of August, 1837. There were two counts in the declaration; one for money had and received, and the other for use and occupation of the premises described in the instrument hereinafter referred to.

It appeared, at the trial before *Wilde*, J., that the plaintiff, on the 31st of March, 1830, demised to the defendant, by an instrument under seal, a parcel of land with the buildings thereon, to hold for the term of seven years and six months, and in said instrument acknowledged that the defendant had paid the sum of $78·64, in full of the rent of the demised premises for the term aforesaid. This instrument purported to be an indenture, and contained a clause for reconveyance by the lessee upon payment of said sum and interest thereon; but it was not executed by the defendant.

It was proved that the defendant held the premises during the term mentioned in the lease; that he, from time to time, let the same, for a part of the term, and received various sums of money from his sub-lessees. In August, 1834, the attorney of the plaintiff, at his request, called upon the defendan to reconvey the premises, telling him that he had received, as the plaintiff alleged, rent to a greater amount than he had advanced when he took the lease. The defendant said he had received very

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little rent from the premises, and refused to reconvey them. He also said that the plaintiff, about eighteen months before, had made a similar demand on him for a reconveyance.

The defendant made various necessary repairs on the demised premises, during the term.

The jury were instructed that the plaintiff could not recover on the count for use and occupation of the demised premises; but that if they should find that when the reconveyance of the premises was demanded, the defendant had received rent therefor to the amount of $78·64, which he had advanced, with interest, and sufficient to pay for the repairs then made, and for his care in managing the estate, then the plaintiff was entitled to recover, on the money count, all the additional money which he proved that the defendant had received for rent.

The judge also ruled, that the instrument called a lease was only a mortgage of the income of the estate for $78·64, and that when that was repaid by the rent, the defendant was bound, on request, to surrender the premises, and annul the instrument or reconvey the estate.

The jury returned a verdict for the plaintiff, and the defendant moved that the verdict be set aside on the following grounds:

1st. That the instrument was an absolute lease, and not a mortgage; and that it only contained a covenant that the defendant would reconvey on the plaintiff's repaying the rent advanced.

2d. That if the defendant were liable to the plaintiff at all, it was only in an action of covenant broken, for violating the covenant to reconvey.

If the court sustain both the defendant's objections, the plaintiff is to become nonsuit. If neither of them be sustained, the verdict is to stand; or it may be altered, and judgment rendered for such sum as, in the opinion of the court, justice requires.

Peabody, for the defendant, argued that the instrument in question was a purchase of the term on a contingency, and not a mortgage. No obligation was imposed on the plaintiff by that instrument; he had merely the privilege of a reconveyance. In order to constitute a mortgage, there should have been an ex-

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press condition. *Kelleran* v. *Brown*, 4 Mass. 443. *Bodwell* v. *Webster*, 13 Pick. 411.

But if the instrument were a mortgage, yet the action should have been on the covenant. There is no implied promise, and assumpsit is not maintainable. *Mill Dam Foundery* v. *Hovey*. 21 Pick. 417, and cases there cited.

Harrington, for the plaintiff. The instrument, on its face, is a mortgage or a pledge ; a mere security for a debt. *Croft* v *Powell*, Com. R. 607. 4 Kent Com. (1st ed.) 136. 2 Bl. Com. 157. *Erskine* v. *Townsend*, 2 Mass. 493. The defendant was bound to reconvey, as he accepted the lease and has had the benefit of it. *The King* v. *Houghton-le-Spring*, 2 Barn. & Ald. 377. When the defendant had received $78·64, and interest, the instrument was *functus officio*. Yelv. 179 *d*, *note*. 16 Vin. Ab. Payment, F. *Smith* v. *Hoff*, 1 Cow. 127. It follows that assumpsit is the proper form of action in this case.

Shaw, C. J. The first and principal question in this case is, whether the construction of the lease in question was correct. The judge instructed the jury, that the lease described in the case constituted an interest or term defeasible on a condition, and therefore had the character of a mortgage. The instrument purports to be an indenture, but was executed by the lessor only. It is a common lease of tenements for seven and a half years, acknowledged and recorded. It recites that the lessee has paid $78·64 in full for the rent for the whole term. Then comes this clause. "And the lessee covenants, promises, and agrees to reconvey said premises to the lessor, upon the payment of the aforesaid sum and interest thereon." It has often been held, that where, upon a conveyance of an estate or interest in land, there is a stipulation in the deed itself or in any separate deed executed at the same time, and constituting with the conveyance one transaction, that the estate shall be reconveyed, upon the payment of money, such stipulation constitutes a defeasance, as much as if the words were "on condition," or "provided however," &c. *Taylor* v. *Weld*, 5 Mass. 109. *Carey* v. *Rawson*, 8 Mass. 159. *Scott* v. *McFarland*, 13 Mass. 310. This rule is most frequently applied to the case of con-

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veyances in fee, but a conveyance for life or years falls within the same principle.

Being then a conveyance for a term of years, defeasible upon a condition, the relation of the parties is that of mortgagor and mortgagee.

In the present case there is no covenant, technically, on the part of the lessee, to reconvey upon condition, because he has not executed the instrument; but being inserted in the same conveyance which raises the term and leases the estate, it enures by way of condition; and the lessee, by accepting the deed, in the form of an indenture, but in effect a deed poll, becomes bound by the condition.

The parties then standing in the relation of mortgagor and mortgagee, all the rights and duties incident to that relation attach to them. The mortgagee, being in possession and taking the rents and profits, must upon redemption account for them, as payment, first to keep down the interest, and the surplus, if any, towards the principal. *Newall* v. *Wright*, 3 Mass. 138.

Another important consequence is, that in this case, if the $78·64 is paid at any time during the term, the condition is saved at law, the estate for years created by the lease is defeated, and the lessor is in of his old estate; whereas, in the common case, if the money is not paid within the time, the condition is broken at law, the estate of the mortgagor is reduced to an equity of redemption, and he must have a bill to redeem, in order to restore him to his estate.

The rents and profits, received by a mortgagee in possession, either before or after condition broken, are so exclusively appropriated by law, without any act of the parties, to the payment of the interest and principal of the debt, or sum to be paid, in order to defeat the estate, that when they amount to a sufficient sum to extinguish the debt, including such principal and interest, the debt is *de facto* paid. If this occurs before condition broken, the estate is defeated, and the mortgagor may enter.

In the present case, it is found that the defendant had received, of the rents and profits of this estate, a sum much more than sufficient to pay the $78·64, and interest, together with repairs

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and all costs, charges, and expenses of every kind; and this being before breach of condition, the lease was determined.

Then comes the question, whether the plaintiff can recover the surplus, over and above the payment of his debt, in an action for money had and received. Had the defendant occupied the estate himself, it would have presented a question of more difficulty. But the case finds that he let out the estate to others, and received the rents. All that he received after his debt was paid, he could not receive as mortgagee, because his term then expired. He received it as money, to which the plaintiff, in good conscience, was entitled. He then received it to his use, and this action will lie for it.

It was said that the remedy of the plaintiff should be sought for on the covenant of the lessee. Probably the counsel for the defendant did not advert to the fact, that the deed is not executed by the defendant, so that there is no covenant, technically, on his part. Perhaps the acceptance of a deed poll would create an express promise on the part of the grantee, to perform acts on his part stipulated in the deed to be performed. *Goodwin* v. *Gilbert*, 9 Mass. 510. When such promise results in nothing more than a duty to pay money, general *indebitatus assumpsit* will lie.

But there is another consideration applicable to this objection. There is no stipulation, on the part of the lessee, to account for the surplus rents, after the debt is paid, but only to reconvey the estate, when it is paid. If he received rents after his debt was paid, he received money which equitably belonged to the plaintiff, and the duty of paying it results and raises a promise implied by law, to enforce which this is the proper form of action.

Judgment on the verdict.

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JOHN HANCOCK & others *vs.* CITY OF BOSTON.

Where parties, interested in the alteration of a street or highway, had actual notice of the proceedings, and attended and were heard concerning them, and have acquiesced therein for many years, a writ of *certiorari* to remove those proceedings will not be granted merely because it does not appear that they had the official notice prescribed by law; nor because one of them was *non compos mentis*, and had no guardian.

PETITION for a writ of *certiorari* to bring up the record of the town of Boston concerning the widening of Beacon Street. The petitioners alleged, that in the year 1815, said street was widened by the selectmen of Boston by taking a piece of land formerly owned by the late Governor Hancock, but then in the possession of his widow as part of the dower assigned to her in his estate, the reversionary interest therein belonging to the petitioners and others: That though a part of the heirs of said Hancock conferred with said selectmen respecting the widening of said street, and objected to the whole proceeding, yet said selectmen, having been advised by counsel that said heirs could make no claim for damages, until after the determination of said widow's life estate, gave no notice to said heirs of their intended proceedings, and awarded them no compensation for the taking of said land, though it was of great value.

The petitioners further alleged, that during the whole of the proceedings aforesaid, and long before, Thomas Hancock, one of the owners of the reversionary interest in said land, was, and ever since has been, *non compos mentis*, and that he had no guardian, until several years after said proceedings were finished. It was alleged, that said selectmen, in the proceedings aforesaid, acted under and by virtue of the statutes of 1799, *c.* 31, and 1804, *c.* 73, and that those proceedings were erroneous for want of notice to said heirs.

The present guardian of said Thomas Hancock was a party to this petition.

The special circumstances of the transaction complained of in the petition, as they appeared at the hearing, are stated by the chief justice.

Greenleaf and ***Hancock***, for the petitioners.

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J. Pickering, (City Solicitor,) for the respondents.

SHAW, C. J. A petition for a *certiorari* addresses itself to the sound judicial discretion of the court, under all the circumstances of each particular case. The object of a *certiorari* is to inquire into and correct substantial errors, such as would be injurious to the rights of the petitioners; and it will not be ordered merely because there are formal or technical errors, nor where the reversal of proceedings would lead to great injustice.

The petitioners, in the present case, object to the proceedings of the selectmen of Boston, in 1815, in widening Beacon Street, that it does not appear affirmatively by the minutes of the selectmen, a copy of which is produced, that the petitioners had notice of those proceedings, or that public notice was given. The widening of Beacon Street took in a part of the Hancock estate, being the mansionhouse of the late Governor Hancock, and the lot in front and adjoining the same, then held by his widow, as her dower, and in which the petitioners had a reversionary interest, expectant upon the determination of that life estate.

It does not appear, that personal or public notice was given, but it does appear from the proceedings, that the selectmen met to take the subject into consideration at their room, and afterwards on the premises; that they were there attended by several of the heirs, who are the present petitioners, and who therefore had notice in fact of the proceedings.

It appears, that at this and subsequent meetings, Ebenezer Hancock, John Hancock, and Samuel Spear, were admitted as parties interested, acting for and representing all the heirs of the late Governor Hancock; their objections were received and considered, and their suggestions of alterations in the proposed plan of widening, so as to diminish the quantity of land to be taken, and diminish the damage to the estate, were taken into consideration and acted on, and to a certain extent adopted. It appears, therefore, by the minutes, that all the heirs did appear by themselves or their representatives, and were fully heard upon all points on which they wished to be heard. It is too late, therefore, to say that no notice was given. According to the strict rule of the common law, in reference to legal process, one

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who has appeared, and made defence upon the merits, cannot afterwards be heard to allege that he was not duly summoned.

One reason assigned for the extraordinary delay in applying for a *certiorari* is, that the selectmen took the opinion of an eminent counsellor, at the time, upon the question whether the reversioners, whilst the widow held a life estate in the premises as dower, could claim for damages, who advised that they could not. This opinion was undoubtedly incorrect, according to the decision of this court in the case of *Ellis* v. *Welch*, 6 Mass. 246, which had been previously made and published. But supposing the petitioners were made acquainted with that opinion, and were led to forbear making a claim for damages during the life time of the widow, it appears that her decease occurred in 1830, and no sufficient reason is given for the delay from that time to the present.

The question now is, whether there were such errors and irregularities in these proceedings as to justify the court in lending its aid to set aside and annul proceedings, which have stood a quarter of a century. The effect of issuing a writ of *certiorari*, and quashing these proceedings of the selectmen, would be to declare that land, which has been used as a public highway for twenty-five years, is now private property, and may be inclosed as such, after valuable improvements have been made upon adjoining estates both of the Commonwealth and of individual proprietors, adapted to, and made in reference to the existence of such highway. The important consideration, upon which all statutes of limitation, prescriptions, and bills of peace, are founded, is, that after such a lapse of time, after all the actors in the transaction are dead, or the facts have faded from their memories, it is impossible to prove what did in fact take place; and this consideration has a direct application to a case like the present. A strong case not merely of irregularity, but of injustice in the proceedings, must be shown, to justify their reversal after such a lapse of time.

The only objection to the proceedings is, that regular and formal notice was not given to all persons concerned, and that

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Thomas Hancock, one of the heirs, was *non compos mentis* and then had no guardian.

But it is manifest that most if not all the heirs in fact had notice, because several, and those perhaps most capable to represent the family, did in fact attend; and it has been already shown that they had a full opportunity to make objections, propose alterations, claim damages, and do all acts which they could have done, had a more formal notice been given. This is no excuse for not giving notice, in ordinary cases, nor is it intended to show that notice was not necessary to the regularity of the proceedings; but it has a strong tendency to show, that, in the particular case, the petitioners suffered no actual damage by the want of notice. Supposing they were deterred, by the alleged mistake of the law, from claiming damages; would they not have been deterred, by the same cause, if they had received more formal notice? The case supposes, that they knew of the acts of the selectmen, affecting their interest in the estate, but made no claim for damages, because they erroneously believed that such a claim would be premature. We cannot perceive that they would have been likely to take any other step, with formal and official notice, which they did not in fact take under the notice which they had.

But it has been strongly insisted that the proceedings were irregular and void, because they affected the reversionary interest of Thomas Hancock, who then was, and ever since has been, *non compos*, and had then no legal guardian, though one was appointed soon after. But we think such a principle cannot be maintained. Where public and official notice is given to all persons concerned, it would be most dangerous to hold, that because there is some one interested in some portion of the estate to be affected, who is under disability, the proceedings are null and void, and may be quashed at any subsequent time. No highway of any considerable extent, or any public improvement, extending over a considerable number of estates, could ever be safely made under such a principle. Such public and official notice must necessarily bind all interests. Nor is any practical injustice likely to be done by this means. If there are married

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women, minors, and persons *non compos*, or under any disability, interested in such property, they will ordinarily have husbands, parents, brothers, or other friends, having a common interest or sympathy with them, who will either take care of their interests, or who will make the necessary representations to the judge of probate, and obtain the appointment of guardians, when it is necessary to the performance of official acts. In this very case, although Thomas Hancock was under disability, and incapable of acting for himself, yet his father and his brother were actually present before the selectmen, prepared to protect his interest as well as their own. These are the persons, who would be regarded as the friends and natural protectors of such a disabled person, and who would be looked to, to see that an official guardian should be appointed when necessary. Indeed the same brother, who was then present before the selectmen, now signs the petition as his guardian. We cannot perceive, therefore, that the interests of Thomas Hancock have suffered from the fact that official notice was not given; and we are satisfied that, in point of law, if such notice had been given, the proceedings would not have been void, or liable to be quashed, because Thomas Hancock had a reversionary interest in the estate, and was under disability as a person *non compos*, without a guardian.

On the whole, without deciding whether the proceedings would in strict law be deemed void, because the minutes of the proceedings of the selectmen do not show an official notice given to persons interested, yet the court are all of opinion that, under the circumstances of this case, no injustice has been occasioned by the want of such notice, that notice *de facto* was had, that injustice might be done by quashing the proceedings after this great lapse of time and long acquiescence, and therefore that the petition must be dismissed.

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Charles E. Wiggin *vs.* Daniel Peters & another.

In computing the time within which a prisoner in execution must surrender himself to close confinement, when he gives bond, pursuant to Rev. Sts. c. 97, § 63, with condition that "if he shall not be lawfully discharged within ninety days from the day of his commitment, he will surrender himself," &c., the day of commitment is to be excluded. And as such prisoner has the whole of the ninety days, thus computed, to obtain his discharge, the condition of his bond is saved, if he surrender himself on the ninety-first day.

A bond with condition that the prisoner "shall, at the expiration of ninety days from the day of his commitment, surrender, &c., unless he shall before that time have been lawfully discharged," is of the same legal effect as a bond with condition in the precise terms prescribed by the Rev. Sts. c. 97, § 63.

Debt on a bond for the liberty of the prison limits.

It was agreed by the parties that Daniel Peters, one of the defendants, was committed to the jail in Worcester, on the 1st of April, 1839, upon an execution on a judgment recovered against him by the plaintiff; and that both defendants, on the next day, executed the bond declared on, one of the conditions of which was that said Daniel should, "at the expiration of ninety days from the day of his commitment, surrender himself at the jail-house for the purpose of being committed to close confinement, unless," &c. It was further agreed, that said Daniel surrendered himself to the keeper of the jail, on the 1st of July, 1839, and was discharged, on that day, by taking the poor debtors' oath.

Plaintiff to become nonsuit, if the surrender was seasonably made, according to the condition of the bond; otherwise, the defendants to be defaulted.

J. F. Barrett, for the plaintiff, cited *Presbrey* v. *Williams*, 15 Mass. 193. *Wheeler* v. *Bent*, 4 Pick. 167.

M. L. Stowe, for the defendants, relied on *Bigelow* v. *Willson*, 1 Pick. 485.

Shaw, C. J. This is a common bond for the prison limits, given by a debtor in execution, pursuant to the provisions of Rev. Sts. c. 97, § 63. The statute requires the condition to be, "that the debtor will not go without the exterior limits of the prison, until he shall be lawfully discharged, and that if he shall

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not be lawfully discharged within ninety days from the day of his commitment on the execution, he will surrender himself to the jailer to be held in close confinement." The condition of the bond actually given by the defendants, though not precisely in the words of the statute, conforms to it in legal effect.

In construing any one provision of a statute containing a series of regulations on the same subject, the whole must be taken together, and considered with reference to the general purpose to be accomplished by them. The obvious intent of the legislature we think was, when a prisoner was imprisoned upon execution, to afford him the benefit of large limits, for a term of time sufficient to enable him to make use of his available means, if he has any, to satisfy and discharge the execution, or otherwise to avail himself of the other privilege given by Rev. Sts. c. 98, to obtain his discharge, by taking the poor debtors' oath. But if he would not avail himself of either mode of obtaining his discharge, the presumption would be that he had means to discharge his debt, which he would not apply; and then it was intended to increase the strictness of his custody to close confinement. But this surrender does not prevent the debtor from obtaining his discharge by means of the poor debtors' oath. This may be done as well after as before commitment to close confinement.

The breach of the bond relied upon is, that the debtor, not having obtained his discharge, did not surrender himself to the jailer to be held in close confinement, within the time limited by the condition.

He was committed on the 1st of April, and surrendered himself to the jailer to be held in close confinement, on the 1st of July. It is further found in the case, that he was discharged by taking the poor debtors' oath, on the same day of his surrender, and we may presume, therefore, that he was not in fact put into close confinement. But this makes no difference. If his notice were made returnable on the same day, so that he could take the oath and obtain his discharge simultaneously with his surrender, his bond was saved, the condition being that he will surrender himself for the purpose of being committed to

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close confinement. Under this surrender, he must have been committed to close confinement, if he could not obtain his discharge by taking the poor debtors' oath, or otherwise. But there is a further provision, Rev. Sts. c. 98, § 11, that on taking the poor debtors' oath by the prisoner, the jailer, on the certificate of that fact, shall forthwith discharge him. Supposing this to have occurred in the present case, the discharge was by force of this last provision, and did not prevent the actual surrender of the prisoner from being a compliance with the condition of his bond, if in other respects such surrender was sufficient.

The sole question therefore is, whether the surrender was in due time. The general rule is, that when an act is to be done in a given term of time, from and after a day named, the day is not included. Otherwise, as it has been said in other cases, an obligation to perform an act in one day from and after a day named, would bind the party to do it presently. The general rule was settled on great consideration, and we think upon satisfactory reasons, in *Bigelow* v. *Willson*, 1 Pick. 485.

The words in the bond are, "at the expiration of ninety days from the day of his commitment." The words in the statute are a little different; "if he shall not be discharged within ninety days from the day of his commitment, he will surrender," &c. But the effect is the same. Ninety days is a term of time excluding the day of the commitment, and the bond is not forfeited, if he obtains his discharge at any time within that term. The case of his not obtaining his discharge cannot happen until the whole of that time has expired, and therefore there can be no breach of this condition till the whole of that time has expired. In the case before us, excluding "the day of the commitment," the term of ninety days expired on the last moment of the last day of June; and as in general the law does not recognize any division of time less than a day, a surrender on the 1st of July, was a surrender *at* the expiration of the last day of June, and therefore was a surrender within the time limited by law, and by the condition of the bond, and saved the forfeiture.

Plaintiff nonsuit.

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City of Boston *vs.* Jesse Shaw.

A by-law of the city of Boston, requiring that every person, who enters his particular drain into a common sewer of the city, shall be held to pay to the city such sum as is his just proportion of the expense of making such common sewer, having reference always to the last valuation of such person's estate, in the assessors' books, previous to the expenditure, is void for inequality and unreasonableness.

The city cannot maintain a count on a *quantum meruit* against one who enters his particular drain into such common sewer.

Assumpsit to recover the amount of two assessments laid on the defendant for entering his private drains into a common sewer made and owned by the plaintiffs. There was also a count on a *quantum meruit*.

It was agreed by the parties, that in 1832 the city of Boston, at its own expense, made a common sewer from a certain point in Pinckney Street, west of the defendant's land, into Charles Street, and through Charles Street into tide waters: That in 1834, on the petition of the defendant and others, the city, at its own expense, continued the Pinckney Street drain easterly, to and beyond the defendant's land: That the defendant had built a house on his land in Pinckney Street, and between February 13th and October 25th, 1834, entered the particular drains therefrom into said Pinckney Street sewer, in that part of it which was laid in 1834; and on said 25th of October, sold and conveyed his said house and land to Mary Foster: That on the said 13th of February, an ordinance of the city was passed, relating to drains and common sewers, of which the first two sections are as follows, viz.

1. All common sewers which shall hereafter be considered necessary by the mayor and aldermen, in any street or highway in which there is at present no common sewer, shall be made and laid, and, together with all common sewers owned by the city, shall be for ever kept in repair at the expense of the city, &c.

2. Every person, who has entered or shall hereafter enter his or her particular drain into any common sewer owned by the city, or shall be or has been otherwise benefited thereby, shall be held to pay the city such sum of money as is their just pro-

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portion of the expense of making said common sewer, having reference always to the last valuation in the assessors' books, previous to the expenditure; and in case of any subsequent repair upon such common sewer, the amount of such repair shall be assessed on those whose particular drains connect therewith, or who are otherwise benefited thereby, in such amount as may be just and reasonable as aforesaid.

On the 6th of June, 1837, an ordinance of the city was passed, establishing the office of superintendent of common sewers, and the 4th section of said ordinance provides, that the said superintendent shall keep an accurate account of the expense of constructing each common sewer, and assess the expense upon the persons and estates deriving benefit therefrom; and, after having completed the assessment, he shall report the same to the mayor and aldermen, and if sanctioned by them, he shall enter the same in books to be kept for that purpose, and shall forthwith make out bills for the said assessments against all persons whose drains have entered the common sewer, or who have been benefited thereby, and deliver the same to the city treasurer for collection, &c. Section 5th provides that the said superintendent shall proceed forthwith to make all assessments for common sewers heretofore constructed by the city, the expenses of which have not already been assessed and collected, in the same manner as he is by this ordinance directed to proceed in relation to those which may hereafter be constructed. An assessment of the expenses of making and laying both the common sewers above mentioned was made by the superintendent of common sewers, which was reported to, and sanctioned by, the mayor and aldermen of said city, at a meeting held on the 5th day of February, 1838, by the following vote. "The superintendent of common sewers made report of the costs of constructing, and the assessments upon the several individuals interested in, the following common sewers. Southack Street, from Green Street to Southack's Court; Charles Street and in the rear of Charles Street and Pinckney. Read and accepted, and thereupon ordered, that the said superintendent make out the several bills and lodge them with the treasurer for collection."

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The said bills, including the defendant's, were accordingly made out and lodged with the treasurer; and a demand was made upon the defendant for the amount of his bill, to be paid within sixty days from the date of such notice, to wit, the 8th day of February, 1833; but the same has not been paid.

There were, at the time of said assessment, and still are, sundry vacant lots in said Pinckney Street, and in that part of Charles Street through which the sewer extends; and both those built upon, (including the defendant's,) and those then vacant, formed a part of the aggregate valuation of estates upon which said assessment was made, according to their respective values by the then last valuation of the assessors; but the assessments on the vacant lots were not actually made at that time, but were reserved to be made and collected when the lots should be built upon, and entries made therefrom into the common sewer. Some of these vacant lots have since been built upon; and upon these there have been assessed and charged, not the sums originally reserved in the aggregate valuation aforesaid, but such sums as they would have been charged if the houses had been built when the assessment was made; and such has been the practice, under the ordinance, in streets where there are vacant lots.

No demand was made, or notice given to the defendant, of any assessment for said sewer, except as aforesaid; nor was any notice given him of the day of the meeting of said mayor and aldermen at which the said assessment was to be sanctioned by them; but the said assessment was so sanctioned by them at their regular weekly meeting, which is held on Monday of every week. Public notice of the intention to construct said common sewer in Charles Street was given by an advertisement published in the Boston Daily Advertiser of June 27, 1832, that the mayor and aldermen would, the Monday then next, at 4 o'clock P. M., at their room, City Hall, take into consideration the expediency of constructing common sewers in several places, and assessing the expense thereof, according to law, upon those whose estates should be benefited thereby, viz. George, *Charles*, Belknap, &c. Streets, and that all persons objecting to the same would then and there be heard if they should see cause. Similar public

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notice of the intention to construct said common sewer in Pinckney Street, was given by an advertisement published in the Boston Daily Advertiser, of April 17th, 1834.

The assessment laid on the defendant as aforesaid, is $49·20, to wit the sum of $34·20 for Pinckney Street, and of $15 for Charles Street. He has constantly resisted the claim of the city therefor, and has never agreed to the same, unless his assent is to be presumed from the facts in the case.

The aforementioned, and all other ordinances of the city in the premises, and the special statutes respecting the city of Boston, are to be referred to as in the case.

If on the foregoing facts, and by force of any law of this Commonwealth applicable to the case, and every valid ordinance of the said city, the court shall be of opinion, that said Shaw is liable for a proportion of said expenses, judgment is to be rendered for the plaintiffs for the said sum of $49·20, or such part thereof as the court shall adjudge; otherwise the plaintiffs shall become nonsuit, and judgment shall be rendered for the defendant for his costs.

A copy of the assessment made in February, 1838, as sanctioned by the mayor and aldermen, is in the case to be referred to.

J. Pickering (City Solicitor), for the plaintiffs. The power of the city to make the ordinances, as to sewers, rests *first* on its authority as a municipal corporation, and *secondly* on its authority to make regulations for the public health. The city government has the same authority, as to the matters confided to them, which the legislature had; and the court will pass upon the city ordinances, as they would upon the statutes of the legislature. *Commonwealth* v. *Worcester*, 3 Pick. 462. *Commonwealth* v. *Gay*, 5 Pick. 44. *Vandine's case*, 6 Pick. 187. *Nightingale's case*, 11 Pick. 168.

The ordinance now in question stands on the same ground as that in *Goddard's case*, 16 Pick. 504, which required him to remove the snow from the sidewalks adjoining his house and lots, and that in *Paxson* v. *Sweet*, 1 Green, 196, requiring the owners of lots fronting on a street to make a brick way in front of those lots.

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The notice in the newspapers, that the city government would consider the expediency of constructing sewers and assessing the expenses, was notice that assessments would be, or might be, laid. And after the assessment was laid, the defendant might have applied for an abatement. The court will not open the assessment. If it be wrongly made, the defendant is, perhaps, entitled to a *certiorari*. *Bow* v. *Smith*, 9 Mod. 94. *Soady* v. *Wilson*, 3 Adolph. & Ellis, 248. *Dore* v. *Gray*, 2 T. R. 358.

It may be objected, that as all the persons benefited were not assessed, the assessment is void. This objection is answered by *Inglee* v. *Bosworth*, 5 Pick. 498, and *Dillingham* v. *Snow*, 5 Mass. 547.

If the assessment cannot be sustained, yet the plaintiffs are entitled to recover upon the count on a *quantum meruit*.

J. T. Austin, (Attorney General,) and *Dexter*, for the defendant. The city government has no authority to tax the defendant for contribution towards the expenses of the sewers. It has only the authority which selectmen formerly had; but that did not extend to public sewers. Anc. Chart. 389. It has authority, by special statutes, as a board of health, but has, by the city charter, no more power to make by-laws than towns have.

No by-law of a town or city can change the liabilities of citizens in a case where the general statutes of the Commonwealth provide for the whole subject, as *St.* of 1796, *c.* 47, does, in this instance. *Mayor, &c. of New York* v. *Ordrenan*, 12 Johns. 122. The ordinance is also repugnant to that statute, and therefore void.

The ordinance is unreasonable and void, being unequal in its operation. If the assessment is to conform to the last valuation, the owner of vacant lots will pay, if they are built upon after a sewer is made, half as much as his neighbor, for the same benefit. And if a small house is succeeded by a large one on the same site, the owner will pay too little. If the city government is *not* bound by the last valuation, it has an arbitrary and unreasonable power, warranted by no law. No appeal can be taken though one was given in all previous cases.

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The ordinance is also bad for want of a provision for notice before an assessment is made.

The proceedings were illegal, and also contrary to the ordinance, on the face of them; and the court will not carry them into effect. The defendant was assessed, on the valuation of 1837, for drains made in 1832 and 1834. The count on a *quantum meruit* cannot be sustained. There is no implied contract, when private individuals use public privileges, to pay therefor.

Pickering, in reply, cited *Rogers* v. *Jones*, 1 Wend. 261, to show that the city has authority to make by-laws, though the legislature has legislated on the same subject.

PUTNAM, J. By the fifteenth section of the charter of the city, (*St.* 1821, *c.* 110,) all the powers, which were by law vested in the town of Boston, are vested in the mayor and aldermen, and common council of the city, and they have power to make all such needful and salutary by-laws as towns may make, and annex penalties, not exceeding $20, for the breach of the same, which shall be in force from and after the time therein limited, without the sanction or confirmation of any court, or other authority whatsoever; provided that such by-laws shall not be repugnant to the constitution and laws of this Commonwealth. And the city council shall have power to lay and assess taxes. The power given to towns to make by-laws is in the Rev. Sts. *c.* 15, § 13, for the managing of the prudential affairs of the town; which, however, are to be approved by the court of common pleas. These by-laws, if reasonable, have as full force, as if they were made by the legislature; and it is for the court to decide whether they are reasonable, or not. *Commonwealth* v. *Worcester*, 3 Pick. 473. If unreasonable, they are void. *Vandine's case*, 6 Pick. 191.

Anciently the law provided that a main drain or common sewer might be laid by an individual, at his own expense, and that those who should enter their particular drains into such main drain, should be obliged to pay, according to the judgment of the selectmen or a major part of them; saving to the aggrieved party a right to appeal to the court of sessions. *Sts* 8 Ann, *c.* 2, and 3 Geo. III. Anc. Chart. 389. 652. And

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substantially the same provisions were contained in St. 1796, c. 47.

The mayor and aldermen derive their authority from the city charter; and by the ordinance of the city, passed February 13th, 1834, it is provided that the city shall thereafter construct and own the common sewers, and assess upon those individuals, who enter their particular drains into the same, their proportion of the expense of making the common sewer, having reference always to the last valuation in the assessors' books previous to the expenditure.

It appears that the city laid the common sewer from a place in Pinckney Street, to the northward of the defendant's land, through Charles Street, in 1834, and that, at the request of the defendant and others, the city continued the same to the eastward of the defendant's land. The defendant built a house on his land between February and October, 1834, and entered his particular drain into the Pinckney Street common sewer, in that part which was laid in 1834, and on the 25th of October, 1834, he conveyed the house and land to Mrs. Foster. The assessment upon the defendant was made according to the vote of the 5th of February, 1838. At the time of this assessment, there were vacant lots in both streets through which the common sewer extends. No assessments, however, were made on those lots, but they were reserved to be made when the lots should be built upon, and drains therefrom should be entered into the common sewer. And when built upon, the assessments have been, as in other like cases, such as would have been charged, if they had been built upon when the common sewer was made.

The amount, which the owner of the land should pay towards the cost of the main drain, should be settled at the time of its construction; and we think the intent was to prescribe a certain rule, by which the amount of the construction should be ascertained, rather than to have it left to an indefinite and final discretion of the city officers. The last valuation in the assessors' books, previous to the expenditure, was the basis upon which the assessment should be laid. Provision was then made for the payment or reimbursement to the city for the whole cost of the

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common sewer. But the assessment, in the case at bar, has not been made according to the valuation of the defendant's land next before the expenditure, which was in 1834, but upon such sum or capital as the mayor and aldermen supposed the land would have been then assessed, if there had been a house upon the land at that time. The assessment was not made until 1838. We think, that such an assessment is not according to the true intent of the ordinance, even if the ordinance itself were valid.

But is the ordinance reasonable and just? We are constrained to answer this question in the negative.

It is better, without doubt, that the city should do the work, and that the mayor and aldermen should judge when and where a common sewer should be made. If it were left to the individual abutters to build the part against their respective lots, he expense might not fall equally; for some might be obliged to carry the sewer through ledges and rocks, at great cost, while others, at a trifling expense, would go through a loose soil. It is better for the city to construct and to own it. And it must be considered as reasonable, that the charge should fall upon the lots abutting, which would have the privilege of entering particular drains from the respective lots into the main drain or common sewer. The right and privilege would become appurtenant to the several lots, and their value would thereby be increased probably quite as much as the amount which should be required to be paid towards the general expenditure. Thus no loss would fall upon the owners of the land. It might happen that some of the owners of vacant lots would not at present want to have a common sewer built, while other owners, having houses on their lots, would consider such an accomodation to be absolutely necessary. Let the mayor and aldermen then judge when and where the public convenience requires such main drains. There is as much reason to subject the owners of the land abutting to contribution to this expenditure, as there is to oblige them to pave the foot-ways in front of their grounds, or to keep the same in repair, when the city shall pave the streets adjoining. It should be a charge upon the land, just as is the requisition on the owners of land abutting on streets to clear away the snow

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at their own expense, which has been determined to be a reasonable provision. *Goddard's case*, 16 Pick. 504. It is a charge upon real estate thus situated, and requisite for the comfort and convenience of all the citizens. But how shall it be apportioned? Shall the owner of the lot next to the outlet be, in any event, held to contribute more than the owner of the lot 600 feet above, if the former lot should have a house upon it, and the latter should be vacant? We think not.

Suppose A. owns a lot next to the outlet at Charles Street, of the value of $1,000, which, with the house upon it, is valued at $10,000, and that B. has a lot of the same dimensions, 600 feet from Charles Street, valued at $1,000. By the ordinance, the contribution should be made according to the valuation of these estates in the books of the assessors. The owner of one lot would be held to pay ten times as much as the other. The apportionment should be made upon the value of the land independently of the buildings, and should be settled in the time of the transaction, so that the city would neither gain nor lose by the work, and the rights and liabilities of the owners of the land be definitely ascertained.

It is not for the court to prescribe the mode by which the amount of the contribution should be ascertained; but we are bound to say that this, which has been provided, is unequal and unreasonable, and therefore void.

We are also of opinion, that the plaintiffs cannot recover on the *indebitatus* count. There is nothing in the case from which the law implies a promise by the defendant to pay the plaintiffs for the benefit he may have received from their common sewer. His obligation to pay is imposed by statute or city ordinance, and not by the common law. All our statutes on this subject, from 8 Ann, c. 2, to the Rev. Sts. c. 27, inclusive, and the city ordinances also, regard contribution towards the making and repairing of common sewers as a matter *in invitum*; and provision is made for a tax or assessment, by public authority, upon the persons benefited. In the absence of an express promise, a legal assessment is, therefore, the only ground of legal liability to such contribution. When a new power and also the means

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of executing it are given by statute, that power can be executed in no other way. *Andover & Medford Turnpike* v. *Gould*, 6 Mass. 44. 4 Bur. 2319, 2323. 7 T. R. 627. *Bangor House Proprietary* v. *Hinckley*, 3 Fairf. 388. *Moncrief* v. *Ely*, 19 Wend. 405.

Plaintiffs nonsuit.

Boston India Rubber Company *vs.* Archibald Hoyt.

It was agreed between A. and B. that if A. would, at his own expense, complete a certain machine which he had projected, and satisfy B., by trial thereof, that it would save one fourth, or more, of the expense then incurred by B. in a certain manufacturing process, B. would pay A. twelve per cent. on the actual savings made by said machine. A. built the machine in B.'s warehouse; but B. in fact paid all the expenses of building it, including the labor of A. thereon. B. used the machine, and the savings made by the use thereof more than repaid him the expense of constructing it. *Held*, that the machine was the property of B.

Trespass for taking and carrying away a machine for dissolving, grinding, and applying India rubber to cloth. At the trial before *Wilde*, J. the only question was, whether the machine was the property of the plaintiffs or of the defendant. The contract in the margin * was relied on by both parties.

* The Boston India Rubber Factory, by their president, does propose to Archibald Hoyt, that if he will, upon his own expense, complete his contemplated machine for dissolving, grinding, and applying India rubber to cloth, and such other materials as said Factory shall apply rubber [to], that whenever said Hoyt shall have fully demonstrated or satisfied the directors of said Factory that his machine or principle will actually save to said Factory one quarter part or more of the expense, to which said Factory is now subjected by dissolving, grinding, and applying rubber to cloth, in the manner said Factory now does it, with the present help or the cheapest help said Factory can hire to do it, in the manner it is now done; and the said Factory will state the price they can hire for, and the expense they are then at, in dissolving, grinding, and applying rubber to cloth, in their present manner of doing it After the said Factory have devised the most saving method of dissolving, grinding, and applying rubber in their present manner of doing it, which they can devise, then said Factory propose to pay said Hoyt, his heirs or assigns, twelve per cent. on what his machine does actually save to said Factory, (after his present model and a new machine shall all be paid for, by said Factory, from the savings to said Factory,) from their

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The plaintiffs proved that they paid all the expense of building said machine; that it was built in their warehouse; and that the defendant had recovered and received of them more than $170 for his labor in building it. It was not denied by the plaintiffs, that the savings of said machine had more than repaid to them the expense of constructing it.

The judge instructed the jury that by the true construction of the contract, the machine was the property of the plaintiffs, and as the defendant admitted that he took and carried it away, the verdict must be against him for damages. The jury returned a verdict accordingly, and the defendant's counsel excepted to this instruction.

Buttrick, for the defendant.

Bolles, for the plaintiffs.

SHAW, C. J. It is extremely difficult to put any sensible construction upon the very obscure and complicated contract, upon which the question in this action depends. That question is, which of these parties was the owner of the machine, for the taking of which by the defendant this action of trespass *de bonis asportatis* is brought.

The subject of the action was a newly invented machine, of which the defendant was the inventor, for preparing India rubber

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present manner and present price of doing it. And whenever said Factory shall discover any other principle, cheaper than the present one, they shall state what that will cost them. Then said Factory will pay said Hoyt, his heirs or assigns, twelve per cent. on what his machine actually does save to said Factory from the last principle or manner of doing it. And the twelve per cent. on all the savings shall be paid to said Hoyt, his heirs or assigns, quarterly, so long as said Hoyt's machine shall continue to save to said Factory, and no longer, provided said Factory shall not claim said Hoyt's machine or principle as their discovery, unless his machine or principle becomes generally known and they can obtain it, or the like, from others, then said per centage to said Hoyt shall cease. Provided, however, said Factory do not make it (said Hoyt's machine) known themselves, in order to be able to obtain it from others; nor shall said Hoyt make it known, directly nor indirectly. And said Factory propose to give said Hoyt two dollars and fifty cents per day, as long as he shall be employed by them

EZRA EATON, *President.*

ARCHIBALD HOYT

Signed interchangeably this 2d day of April, 1836, in presence of N. P. MANN.

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and applying it to cloth. It was built in the plaintiffs' warehouse, and was in their possession when it was taken by the defendant. The facts tend to show that both parties had such a qualified and mixed possession, that the decision in the present case must follow the right of property. And to determine this, both parties appeal to the contract. This contract consists of a proposal made by the president of the company to Hoyt, and assented to by him, by signing his name to the proposal.

It appears that this was the first machine, built upon the principle of the defendant's invention. It is spoken of as a contemplated machine, and all the offers of the company are based upon the condition, that the machine shall be tested and found useful on trial. The proposal is, that he will, upon his own expense, complete his contemplated machine. Hence it is argued, that if built at his expense, it was to be his property, when built; and this would be a fair inference if it stopped here, and he had built it at his own expense, according to the proposal. The object of this proposal, we think, was this; it was to be built at his risk, because it might, on being tested, prove worthless, and then the company would have no savings, from the use of it, out of which to reimburse its cost; and in that event, the company would neither pay for it, nor own it. But in a subsequent part of the proposal, after a great many obscure details as to the manner of comparing the results of the operation of this machine, in point of economy, with other methods of performing the same work, they propose to pay him a certain *percentage* of what his machine does actually save to said Factory, (after his present model and a new machine shall all be paid for, by said Factory, from the savings to said Factory,) &c. Now the construction we put upon it is this. It was first to be built at his expense, because it might be useless and make no savings. If they in fact made advances for labor and materials for it, these were to be a charge to him. But if, when built and put into operation, it made a saving, the whole of that saving was to be applied by the company to pay for the cost of the machine; that is, in the case supposed, to repay the expense which Hoyt would have been at in building it. But these savings were part of the earnings and

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profits of the company, independent of any agreement, and therefore when the machine was paid for by them, out of their own profits, the property in the machine, thus paid for by them, must be understood to be in them. It was only after the machine was paid for and become theirs, that he was to receive a certain percentage of the savings to the company from the use of the machine.

Now there are two views, in which the subject of property in this machine may be considered. The case shows that in fact the machine was built at the expense of the company, that they paid for the labor and materials, and even paid the defendant for his own labor upon it. If this was paid by them, and not charged to the defendant, then it would show, that that part of the agreement was not complied with by Hoyt; that it was not built at his expense; and that the property of the machine was in the company as builders.

But, suppose these advances for labor and materials were charged to the defendant; then, it being conceded by both parties, that the savings of the machine had more than repaid the plaintiffs all its expenses, it is only to set their savings against those charges, and the cost of the machine will prove to have been paid for by the company, and then the machine was theirs. Whatever other mutual claims there may be between them, is immaterial to this action, which is trespass *de bonis asportatis*, and must depend on the question, who was the owner of this machine at the time of the alleged taking. In any view of the case, we think it was originally or had become the property of the plaintiffs, that the right of possession and the right of property concurred, and that the verdict for the plaintiffs was right.

Judgment on the verdict.

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DAVID H. ROBINSON *vs.* THE MANUFACTURERS' INSURANCE COMPANY.

An insurance of "freight on board" a vessel means the same as "freight of the vessel."

Insurance was effected on freight of a vessel at and from Cadiz to a port in Sicily, and at and from thence to her port of destination in the United States. The vessel was lost in the Bay of Cadiz, after being ready to sail for Palermo in Sicily, having on board a very small quantity of goods on freight, and those shipped for her port of destination in the United States. The assured had chartered the vessel, except the cabin, deck, and necessary room for the accommodation of the crew, (reserving to the master the privilege of freight in the cabin,) from Palermo to New York, for $ 2,500, and $ 35 *per diem* demurrage.

Held, that the whole freight from Cadiz to Palermo, and from Palermo to the United States, was one entire subject of insurance; that the valuation was not so great as to raise a suspicion of fraud; and therefore that the underwriters were not entitled to have the policy opened, but were liable for a total loss.

ASSUMPSIT on a policy of insurance, dated March 12th, 1838, by which $ 5,000 were insured "on freight on board ship Herald, at and from Cadiz to one port in Sicily, and at and from thence to her port of destination in the United States."

The freight was valued at $ 5,000, including the premium, which was $ 175. The plaintiff owned the vessel, and on the 25th of November, 1837, chartered her to Chamberlin, Boon, & Co., for a voyage from Palermo to New York, for $ 2,500, with $ 35 *per diem* demurrage; "excepting the cabin, the deck, and the necessary room for accommodation of crew, &c. The captain to have the privilege of freight in the cabin." The vessel sailed from New York, December 3d, 1837, bound to Cadiz, and thence to Palermo, and thence home. She arrived at Cadiz January 1st, 1838, discharged her cargo there, took eight coils of rigging, of fifty fathoms each, to be carried to New York, and on the 24th of February, when ready for sea, and about to sail for Palermo, was wrecked in the Bay of Cadiz.

A policy on the vessel had been previously made, viz. November 24th, 1837, by the Pacific Insurance Company, insuring "Z. Cook, Jr. for D. H. Robinson, for whom it concerns, payable to said Robinson, or order, $ 5,000 on the freight of ship Herald at and from New York to Cadiz, and at and thence to

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one port in Sicily, and at and thence to a port of discharge in the United States." This policy was cancelled on the same day that the policy now in suit was made, at which time the arrival of the vessel at Cadiz was known to the assured.

The Herald was abandoned to the defendants, April 17th, 1838. The protest was delivered to them on the 25th of May, and the survey on the 28th of May, 1838.

It appeared from the deposition of the master, that during almost all the time the Herald was at Cadiz, the weather was so rough and the sea so heavy, that lighters could not be kept along side to take out the cargo, which was not wholly discharged until the 20th of February, 1838, fifty days after the vessel arrived there. The vessel was put up for freight by the master, in pursuance of the plaintiff's orders; and the master attributed it partly to being detained at Cadiz so long, that he did not obtain more freight for Palermo; and *he was informed* by his agents, that some, who originally intended to send freight to Palermo, altered their minds. He could not form an estimate of the amount of freight which might have been obtained under favorable circumstances, but deposed that "it might have been five hundred dollars, or five times that amount." He also deposed, that the freight from New York to Cadiz was about one thousand dollars, which was paid in advance, except $170, which he received at Cadiz.

On the foregoing facts and testimony, the question was, whether the plaintiff should recover for a total loss, or the policy be opened on the ground of an overvaluation.

Parsons, for the plaintiff, argued, that within reasonable mercantile probability, the plaintiff might have valued the freight at $5,000. The policy covered the voyage from Cadiz to Palermo; the demurrage at Palermo, which was uncertain; the voyage from Palermo to New York; and the freight of the deck and cabin on this last voyage. 1 Phil. Ins. (1st ed.) 345. *Alsop* v. *Commercial Ins. Co.* 1 Sumner, 468. *Dumas* v. *United States Ins. Co.* 12 S. & R. 437. *De Longuemere* v. *Phœnix Ins. Co.* 10 Johns. 127. *Wolcott* v. *Eagle Ins. Co.* 4 Pick. 429. *Shawe* v. *Felton*, 2 East, 109. *Coolidge* v. *Gloucester Ins. Co.* 15 Mass. 341.

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"Freight on board," is the same as freight on goods to be put on board. But in this case, the vessel was wrecked when the policy was made. The plaintiff, nevertheless, is entitled to recover. *Horncastle* v. *Suart*, 7 East, 400. *Davidson* v. *Willasey*, 1 M. & S. 313. *Livingston* v. *Columbian Ins. Co.* 3 Johns. 49. *Truscott* v. *Christie*, 2 Brod. & Bing. 320. *Riley* v. *Hartford Ins. Co.* 2 Connect. 368.

W. D. Sohier, for the defendants, argued that the terms of the policy did not cover the case as exhibited by the facts. The plaintiff applied for insurance upon freight *on board*, and the defendants knew nothing except what those terms imported. The event, which satisfies these terms, never happened, except as to the coils of rigging. For loss of freight on them, the defendants are liable. An indemnity only is to be recovered by the plaintiff. The whole subject matter must be at risk, or the assured can recover only what he proves he has lost. *Clark* v. *Ocean Ins. Co.* 16 Pick. 289. *Coolidge* v. *Gloucester Ins. Co.* 15 Mass. 341.

In this case, the plaintiff sought more than an indemnity by procuring this second policy. He valued the freight from Cadiz to Palermo at the sum at which, in his first policy, he estimated the freight from New York to Cadiz. There were several voyages in this instance; *Hughes* v. *Union Ins. Co.* 8 Wheat. 294. *Wolcott* v. *Eagle Ins. Co.* 4 Pick. 429; and the plaintiff never could have expected freight from Cadiz to Palermo. Demurrage is for *non user*, and ought not to be brought into the account of freight.

SHAW, C. J. Were this a common insurance on freight of ship Herald, in common form, valued at $ 5,000, on the loss proved, there would seem to be no doubt of the plaintiff's right to recover. The term freight is somewhat equivocal, and has several meanings. It is sometimes used to describe the compensation for the carriage of goods, sometimes for the hire of a vessel, and sometimes it is used in a loose sense to signify the goods or property carried. It is never, however, used in the latter sense, when intended to describe a separate subject of insurance; but is then used in contradistinction to ship and cargo, to designate the

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compensation to be paid to the ship-owner, for the use of his vessel, either for the carriage of merchandise, or for the hire of the vessel in whole or in part. It is also held, that a ship-owner may insure the profit and benefit to be derived from the employment of his own ship, for the carriage of his own goods, under the name of freight.

We are then to inquire, what is the effect of the particular words used in this policy. The words are, "5,000 on freight on board ship Herald, at and from Cadiz to one port in Sicily, and at and from thence to her port of destination, in the United States. Freight valued at $ 5,000."

There was an inception of the risk, by *taking in* some goods at Cadiz, though a small quantity, and by commencing the voyage to Palermo in Sicily, under a charter party previously entered into, for a freight from Palermo to New York. In general, the inception of a voyage, even in ballast, from one port to another to take a cargo, pursuant to a charter party, is an inception of the voyage on which freight is to be earned, and if the vessel is lost before arriving at the first port to take in the cargo, it is a loss on freight.

Then the question is, what was intended by the words "on board." The sentence is obviously elliptical. Considering "freight" as the hire or price to be paid for the use of the vessel, "freight on board," is unmeaning. Something must be supplied. The defendants insist, that we must understand it, freight of property, when laden on board. But this is certainly not the necessary or most probable meaning. It may as well mean, freight of property "expected or intended to be put on board," or "agreed to be put on board," as in case of a charter party. By the defendants' construction, both rights to freight could not co-exist, because no goods could be laden on board at Palermo, till after the voyage from Cadiz to Palermo had terminated. But we think it manifest from the valuation of the whole freight, as well from Cadiz to Palermo as from Palermo to New York, that it was regarded by the parties as one entire subject of insurance, and that it was intended to cover all the freight of both voyages. And this is perfectly consistent

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with the words of the policy, if we supply the ellipsis, which must be supplied with something, with the words, "to be laden on board," making it apply both to Cadiz and Palermo; which is quite as consistent with the general purpose, and more consistent with the whole effect of the contract, than the words, "when laden on board," so as to prevent it from taking effect until the goods should be actually laden, or begun to be laden on board.

It may be said that the words "on board," have, upon this supposition, no effect, and mean the same as freight of ship Herald. We think the meaning is nearly or wholly the same.

Such being the intent of the contract, the freight expected on the voyage home might amount to something over $2,500, and the freight of the intermediate voyage appears to have been considered very uncertain. We therefore do not think the valuation was so great as to raise a suspicion of fraud. If the whole subject matter, intended to be included in the valuation, was not put at risk, then the policy must of necessity be opened, and it would not be consistent with the contract to permit the assured to recover the whole valuation. *Forbes* v. *Aspinall*, 13 East, 325. *Wolcott* v. *Eagle Ins. Co.* 4 Pick. 429.

In the present case, the whole subject intended to be covered by the valuation, viz. the freight to be earned between Cadiz and Palermo, and between Palermo and New York, were put at risk. Had the eight coils of cordage been carried safely from Cadiz to Palermo, and no loss occurred on the freight home, the whole premium would have been due to the underwriters, and they would have been exempted from all loss. This was what they insured. It was lost; and we think they were liable according to the value agreed on by the policy. We think the assured cannot be in a worse condition than if their vessel had sailed in ballast from Cadiz to Palermo, to take on board a cargo in pursuance of a contract previously entered into to take a cargo from thence to New York, which would entitle the plaintiff to recover in case of loss.

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William B. Belcher *vs.* Daniel Johnson.

A justice of the peace in Chelsea has no jurisdiction of a complaint against a member of a company of militia in that town for violation of the militia law. Exclusive jurisdiction of such complaint is given to the justices' court for the county of Suffolk

This was a petition for a writ of *certiorari* to bring up the record of proceedings before a justice of the peace in the town of Chelsea, on a complaint against the petitioner for his unnecessarily neglecting to appear at the inspection of a company of militia in that town, on the first Tuesday of May, 1838. It appeared from a copy of said proceedings, that said justice rendered judgment against the petitioner, on the complaint of the respondent, for four dollars fine or forfeiture, and costs of prosecution.

E. Smith, for the petitioner, denied that the justice had jurisdiction of the matter of the complaint. By Rev. Sts. c. 87, § 11, the justices' court for the county of Suffolk has exclusive jurisdiction in all civil actions in the county of Suffolk. This, though a proceeding which has some of the incidents of criminal process, is substantially a civil action. *Winslow* v. *Anderson*, 4 Mass. 376. *Dyer* v. *Hunnewell*, 12 Mass. 271. *Mariner* v. *Dyer*, 2 Greenl. 172. *Hinman* v. *Taylor*, 2 Connect. 357. *Hill* v. *Wells*, 6 Pick. 104.

J. Dana, for the respondent, said that the justices in Chelsea had uniformly taken cognizance of complaints of this nature, and had relied on *Winslow* v. *Anderson*, 4 Mass. 377, where it was said by *Parsons*, C. J. that "the proceedings are not *civiliter*, as upon a contract, or *quasi ex contractu*, but *criminaliter*, for an offence against law." In 12 Mass. 273, it is said, that "in some views this process may be considered as a criminal one." In order to deprive the justices of Chelsea of jurisdiction, it should be shown that the process is wholly civil. If it partakes at all of a criminal nature, their jurisdiction is not taken away.

Dewey, J. The petitioner asks for a *certiorari*, that the

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proceedings before the magistrate may be quashed, on the ground that he had no jurisdiction of the subject matter.

By the Rev. Sts. c. 87, regulating the police and justices' court, established in the city of Boston, it is enacted in § 10, that there shall be a court for the trial of civil actions, to be held by one or more of the justices of the police court, which shall be called the justices' court for the county of Suffolk; and it is also further enacted in § 11, that the said justices' court shall have and exercise exclusively the same jurisdiction in all civil cases in the county of Suffolk, that is exercised by justices of the peace in other counties. If the proceeding instituted before the justice, which was the foundation of the judgment rendered against the petitioner, is properly denominated a civil action, then no other justice of the peace for the county of Suffolk, than one of the police justices, had jurisdiction of the subject matter; and the fact, that the cause of action accrued in the town of Chelsea, does not vary the right of jurisdiction.

The form of proceeding, to enforce the collection of forfeitures for neglect of military duty, is somewhat peculiar, and in some respects differs from ordinary civil actions.

But the inquiry here is, not as to its precise similarity to ordinary civil actions, but as to its more general characteristics indicative of its falling within the civil or criminal jurisdiction.

The form of proceeding is very material to be considered in determining the present question. It is not by any means decisive, that the object of the law in granting the remedy was to punish a public offence. If it were so, *qui tam* actions would necessarily be held to be criminal actions. Many of our statutes give two distinct remedies for violations of statute prohibitions, or omissions to do certain required acts; as proceeding by an indictment, or by a *qui tam* action, or sometimes by an action upon the case. The act intended to be punished by all these various modes, is one and the same, yet the remedies, or the suits given by the statute, are clearly distinguishable into civil and criminal.

A comparison of the present case with that of *Hill* v. *Wells*, 5 Pick. 104, which was a suit under the statute of 1785, c. 66,

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and which the court was of opinion might properly fall within the jurisdiction of the criminal courts for the county of Suffolk, will show, that many of the tests there relied on are wanting here. The suit in that case was founded upon a complaint made under oath, a warrant was issued returnable forthwith and upon the adjudication of the court not being complied with, the respondent might have been immediately committed to prison. There were also other circumstances in that case, arising from the apparent want of jurisdiction, in the civil courts of Suffolk, of the subject matter.

The question before us was incidentally spoken of in the opinions of the court, in the cases of *Winslow* v. *Anderson*, 4 Mass. 376, and *Dyer* v. *Hunnewell*, 12 Mass. 271 ; but there was no adjudication upon the precise point. In the former of these cases, the tendency of some of the remarks of the learned judge, who delivered the opinion of the court, is somewhat favorable to the position, that this proceeding is a criminal process ; but in the latter, the opinion of the court, that the provisions of the "act for the relief of poor prisoners who are committed by execution for debt," (*St.* 1787, c. 29,) are applicable to cases of prisoners committed on execution for non-payment of militia fines, seems more in accordance with the doctrine, that this proceeding is a civil one. Applying the form of proceeding as a test of this question, the suit is more properly classed with civil than criminal cases. This appears from the institution of the process in the name of the clerk, on his complaint not under oath ; in the use of a summons, instead of a warrant ; in the right of amendment at any stage of the proceedings ; and in the form in which judgment is rendered and execution issued. In the opinion of the court, this case was cognizable only by the justices' court for the county of Suffolk, to be held by one or more of the justices of the police court of the city of Boston, and the petitioner is therefore entitled to a *certiorari*.

Writ of certiorari granted

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COMMONWEALTH *vs.* JANE LEWIS.

When in an indictment against a woman, she is described as A. B. "wife of C. D." these latter words are mere addition, or *descriptio personæ*; and it need not be proved, on the trial, upon the plea of not guilty, that she is such wife. If such addition be wrong, it must be excepted to by plea in abatement.

A married woman, who lives apart from her husband, may be indicted alone, and punished, for keeping a house of ill fame.

THE defendant was convicted, in the municipal court of the city of Boston, of keeping a house of ill fame. The indictment alleged that "Jane Lewis, wife of Andres V. Lewis, on the first day of May, &c., in the absence of her said husband, did keep and maintain a certain house," &c. The defendant pleaded not guilty. At the trial in the court below, the judge ruled that the Commonwealth must prove that the defendant was a married woman, before she could be convicted. A witness was then called, who testified that he knew the defendant's husband, and that he had not lived with her since she kept the house in question. Another witness testified that the defendant had spoken to him about her husband, whom the witness knew personally, and that she had told the witness that her husband did not live with her, and that she hired this house herself. No other evidence was offered to prove that the defendant was a married woman. The defendant's counsel objected, that this was not competent evidence to prove the marriage; but the judge overruled the objection, and upon this and other evidence in the case, the jury found the defendant guilty. The case came to this court upon exceptions to the ruling of the judge in the court below as to the competency of the evidence to prove the marriage of the defendant.

Wheelock, for the defendant, argued that the averment in the indictment was a specific allegation which must be proved, and not a mere description of the defendant; and that the evidence given at the trial was neither sufficient nor competent. 2 Stark. Ev. 932. *Commonwealth* v. *Littlejohn*, 15 Mass. 163.

Austin, (Attorney General,) for the Commonwealth, cited 1 Chit. Crim. Law, 206, to show that the words "wife of A. V.

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Lewis," were the mere addition and the proper addition of the defendant. Some addition must be given, but an omission or mistake of addition can be excepted to only by plea in abatement. 1 Chit. Crim. Law, 445 – 447.

The judge below erred in requiring proof that the defendant was the wife of A. V. Lewis; and this court, even if the proof was insufficient, (which is not admitted,) will not arrest the proceedings.

DEWEY, J. The counsel for the accused insists that it was incumbent on the government to prove, on the trial of this cause, that she was the lawful wife of Andres V. Lewis, and that the presiding judge admitted incompetent evidence in proof of that fact. Before proceeding to the consideration of this objection, it may be proper to remark, that no question is raised as to the sufficiency of the evidence to have warranted the jury in finding that the defendant kept a house of ill fame, had she been charged with doing it under the description of a feme sole. But it is said that she is charged with the offence complained of, accompanied by the allegation, that she was the wife of the said Andres. This allegation is found in the indictment, in that part of it in which the defendant is first named, and wherein she is described as "Jane Lewis, wife of Andres V. Lewis, of Boston," and also in the subsequent allegation, in the indictment, that she, "in the absence of her said husband, did keep and maintain a certain house of ill fame," &c. These are supposed, by the counsel for the defendant, to be material allegations, and necessary to be proved on the trial, under the plea of not guilty. But in the opinion of the court, the allegation that the prisoner was the wife of Andres V. Lewis, is a mere *descriptio personæ*, or addition, and if erroneous as such, the only remedy is by a plea in abatement. The plea of not guilty was a waiver of all objections of this nature, and put in issue only the material allegations necessary to constitute the offence of keeping a house of ill fame. It is therefore unnecessary to express any opinion as to the competency of the evidence, offered to prove that the defendant was the wife of said Andres V. Lew

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is, as that question was not raised by the issue on which the jury were called to pass.

As to the other allegation in the indictment, that the act complained of was committed by the defendant "in the absence of her husband," it may be remarked, that it is no part of the statute provision, upon which this indictment is founded, (Rev. Sts. c. 130, § 8,) that the party should be a married woman, or that she should do the acts therein forbidden "in the absence of her husband." The statute provides that "*every* person, who shall keep a house of ill fame, &c." "shall be punished, &c." The only ground for requiring proof of the absence of the husband, would be by assuming that the defendant was the lawful wife of Andres V. Lewis, (a fact denied by the defendant to be proved by competent evidence,) and by showing that the offence charged was one which, if participated in by a married woman, would not constitute her a guilty party; she being supposed to have acted in subjection to her husband. The humanity of the criminal law does, indeed, in some instances consider the acts of the wife as venial, although she has in fact participated with her husband in certain acts, which, on the part of her husband, would constitute an offence, as against him; upon the ground that much consideration is due to the great principle of confidence which a feme covert may properly place in her husband, as well as the duty of obedience to the commands of the husband, by which some femes covert may be reasonably supposed to be influenced in such cases.

Thus in cases of theft, or burglary, where the wife is in company with her husband, the law presumes that she acts under coercion; and she is to be acquitted. But even this presumption, it is said, may be controlled by clear evidence that she was the principal offender. And this rule of presumption of coercion, on the part of the husband, does not prevail in relation to a case like the present. 1 Russell on Crimes, (1st ed.) 26. This is an offence, of which a feme covert may be guilty, as well as if she were sole; and she, together with her husband, may be convicted and punished. 1 Russell on Crimes, 433. 1 Salk. 384 And it is a general rule, that if the offence be of the

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character that it may be committed by her alone, without the concurrence of the husband, she may be punished alone. 1 Russell on Crimes, 26. 4 Bl. Com. 29. But even if it were necessary, in the present prosecution, to establish by evidence the fact of the absence of the husband, the confessions of the wife were entirely competent to prove that fact. It could have been necessary to be proved only upon the assumption, that she was a married woman; and if she was married, the absence of her husband was properly shown by the evidence.

Upon the whole matter, the court are therefore of opinion, that the verdict was well authorized by competent evidence, and that the exceptions be overruled.

Simon C. Hewitt *vs.* Philip Wilcox.

Since the repeal of the statute of 1818, *c.* 113, an unlicensed physician or surgeon may maintain an action for professional services rendered before the repeal.

Assumpsit for services rendered by the plaintiff as a surgeon and physician. It was agreed by the parties that the plaintiff rendered the services set forth in the declaration, while the statute of 1818, *c.* 113, "regulating the practice of physic and surgery," was in force, and that he had not previously been licensed or graduated, as was required by that statute to entitle him to the benefit of law for the recovery of compensation. This action was commenced since that statute was repealed, and judgment is to be rendered for the plaintiff or for the defendant, as the court shall order.

Wheelock, for the plaintiff. The statute of 1818, *c.* 113, while in force, merely deprived the defendant of a legal remedy. It did not render invalid the contract between the parties; and upon its repeal, the plaintiff became entitled to maintain this action. *Bigelow* v. *Pritchard*, 21 Pick. 169.

Bartlett, for the defendant, argued that there never was a valid contract between the parties. The law will not imply an assumpsit while the statute was in force. No express promise is

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alleged, and mere moral obligation is no ground for an implied one.

But if there was a valid contract, without a remedy, the repeal of the statute gave the plaintiff no right of action. Retrospective operation of statutes, even as to remedies, is discountenanced by courts. *Dash* v. *Van Kleeck*, 7 Johns. 503. *Woart* v. *Winnick*, 3 N. Hamp. 473. *Society* v. *Wheeler*, 2 Gallis. 139.

The defendant's right to defend under the statute of 1818, is reserved to him by the Rev. Sts. *c.* 146, § 5.

Shaw, C. J. It may be admitted, we think, that it was the policy of *St.* 1818, *c.* 113, upon the construction of which this action depends, to throw a discouragement in the way of unlicensed and irregular practitioners of medicine and surgery, and lay them under a disability in this respect. The provision was, that no person, entering the practice after the day therein named, should be entitled to the benefit of law for the recovery of any debt or fee accruing for his professional services. Taking the terms together, the word "recovery," with that of "benefit of law," the construction, we think, is, "benefit of legal proceedings"; including all modes in which payment of a debt may be obtained by process of law, or other legal proceedings, such as set-off, claim before commissioners of insolvency, and the like. It results from this, that the policy of the statute was intended to be reached and effected, not by providing that a debt should not accrue, by force of the common law, from services done on request, but that the debt should not be enforced by legal proceedings of any kind. It therefore affected the remedy, but not the right. If this was the purpose of the law, then it left in force that great principle of the common law, that when services are performed on request, and no agreement is made in respect to them, the law raises an implied promise, to pay so much as the person performing them deserves to have; and when there is no restraint upon the remedy, an action lies on such promise. When therefore the statute was repealed, which imposed this restraint upon the plaintiff's remedy, he had a right, at common law, to commence and maintain his action. Such re-

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peal was effected by the revised statutes, and the repealing act which accompanies them.

It has however been insisted, that the repeal was qualified and restrained by the provision of the Rev. Sts. c. 146, § 5, that the repeal shall not affect any act done, or any right accruing, or accrued, or established, or any suit or proceeding had or commenced before such repeal should take effect. The construction already put upon this act, that it affected the remedy and not the right of the plaintiff, is an answer to this argument. No right accrued to the defendant under the statute of 1818; he was shielded from any liability to an action, whilst the statute was in force, but no right vested or accrued, or begun to accrue, under it. This clause, therefore, does not take the act of 1818 out of the operation of the general repealing clause of the revised statutes.

Judgment for the plaintiff.

WILLARD PHILLIPS, Judge, &c. *vs.* EDWARD BLAKE, Administrator.

If a creditor actually receives bank bills of his debtor, though he protests that he will not receive them unless the difference between their value and that of specie shall be allowed to him, and the debtor refuses to make, or to promise to make, such allowance, the creditor cannot maintain an action to recover the amount of such difference.

DEBT on a probate bond executed by the defendant's intestate, Jabez Hatch, as surety of Jabez Hatch, Jun., administrator of the estate of William Gallagher. The action was brought for the benefit of said Gallagher's heirs, who reside in Great Britain.

It appeared at the trial before *Wilde*, J. that by decrees of the former judge of probate for the county of Suffolk, the said Jabez Hatch, Jun. was ordered to pay to the heirs of said Gallagher certain sums of money, which, though the same were duly demanded, he neglected to pay. The defendant gave in evidence three receipts, signed by R. E. Manners, attorney of the said heirs, in which said attorney acknowledged that he had received

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the amount aforesaid, at different times, "in current bank bills of the Boston banks." The last receipt contained this clause, viz. "a claim for the discount on said bills, and on bills receiv ed" when the former receipts were given, "being first made and left with said Blake, to be hereafter disposed of, he reserving every right belonging to the parties interested, and represented by him, to oppose said claim."

The plaintiff was permitted to prove, the defendant objecting to the admission of the evidence, that before and at the time when said payments were made, the banks in Boston had suspended payment in specie; that at the several times when the receipts were given, specie was at an advance of eight, nine, and ten per cent., and that said Manners refused to receive any part of said bills unless the discount upon them for specie, or exchange on England, should be allowed him; and that he made out, and left with the defendant, a claim for said discount, the amount thereof to be thereafter ascertained, as mentioned in said last receipt.

It appeared that said Manners did not demand specie at the banks on the bills so received by him of the defendant, and that he credited the heirs of Gallagher with the bills at the full amount, and remitted to them that amount in English bills of exchange, which he had received on his own account, and which he charged to said heirs at the market rate when he made the remittance.

The judge instructed the jury, that as this suit was for the benefit of the heirs of Gallagher, the plaintiff's right to recover depended on the question whether said heirs had lost any thing by the mode of payment resorted to; and that if they had so lost, the verdict should be for the plaintiff, for the amount of such loss; reserving the question whether the plaintiff was entitled to recover at all, on the facts proved. The jury returned a verdict for the plaintiff for $ 197·12.

Judgment to be rendered on the verdict, or the plaintiff to be nonsuit, or a new trial to be granted, according to the opinion of the whole court.

Blake, pro se. Receipts are conclusive evidence of payment, except where a mistake is made. *Stackpole* v. *Arnold*, 11 Mass. 32. 1 Phil. Ev. 108, 4th Amer. ed. The bills were

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received in this case, at their numerical par value, and no further sum can be demanded. *Edwards* v. *Morris*, 1 Ham. 524. See also *Hevener* v. *Kerr*, 1 South. 58. Bank bills are a tender, if not objected to and refused. *Hoyt* v. *Byrnes*, 2 Fairf 475. *Snow* v. *Perry*, 9 Pick. 539.

The attorney of the heirs should have demanded specie of the banks. *Non constat*, that he would not have obtained it. By retaining the bills, he deprived the defendant of the right to demand specie for them, and to recover penal damages if payment in specie had been refused. Rev. Sts. *c.* 36, § 29.

Blair, for the plaintiff, argued that by the fair construction of the receipts, the bills were received under an agreement that the defendant should pay the discount, when it should be ascertained. The receipts, on the face of them, give the parties a right to show, by parol evidence, what was the value of the bills received. *Johnson* v. *Johnson*, 11 Mass. 363. *Howe* v. *Mackay*, 5 Pick. 44. *Perry* v. *Coates*, 9 Mass. 537. *Jones* v. *Fales*, 4 Mass. 252.

The testimony, as to the refusal of Manners to receive the bills unless the discount should be allowed, was properly admitted. 3 Dane Ab. 493.

Shaw, C. J. The question is, whether the facts found show a payment in full of the decrees of distribution. The facts show that the defendant offered payment in bank notes, which the attorney of the heirs refused to take in payment at *par*, but subsequently did take. The evidence shows satisfactorily, that there was no agreement between the parties, either on the part of Mr. Blake, to make good the discount, or on the part of Mr. Manners, to waive his claim to a discount, and receive the bills at *par*. On the contrary, each claimed to stand upon his legal rights, and each gave notice to the other, that he should do so. Under this mutual protest, the bills were paid and received. The question then is, independently of any agreement, what those legal rights are.

The general rule is, that if payment is made in bank bills, and accepted, it is a good payment. Bank notes are deemed money, and pass as such, unless objected to on that ground

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and they are considered a good tender, unless specially objected to on that account. *Wright* v. *Reed*, 3 T. R. 554. If such tender is accepted, it is of course a payment. In the present case, the general effect of what passed was, that Mr. Blake offered and paid the bank notes as money, and refused to allow any discount. But Mr. Manners refused to accept them as money, but did accept them. Under these circumstances, the court are of opinion, that although he was not bound to accept bank notes as money, yet as they were offered as such, and on no other terms, and no agreement was made to allow a discount, and he accepted them, he must be deemed to have taken them upon the terms offered, as money. The act in such case is conclusive of his assent, and the protest unavailing.

But there are some other considerations, which lead to the same result. A bank note is evidence of a credit, at the bank, for a like sum of money, and a contract to pay it to the holder, in specie. The law presumes it will be paid on request, and it gives a penalty to the holder, for damages for non-payment, which is deemed sufficient to make the bank note equivalent to cash. The agent of the heirs, by receiving the bank notes, took upon himself the power and duty of collecting them, and took from the plaintiff that power. The condition of the parties was changed in this respect. The defendant, by retaining the bills, would have had a legal right to demand payment in specie, and, on failure, to commence an action and recover large damages for the detention ; and it may be presumed that he regarded this right, as making the bank notes equivalent to specie in value. This right was transferred to Mr. Manners, by the tender and acceptance.

It might admit of a serious question, whether it would be competent for the plaintiff, if, on other grounds, he could maintain this action, to recover the difference between the nominal value of the bank notes and their current value in market, in consequence of a suspension of specie payments, without showing an actual demand upon the bank, and refusal to pay in specie. No such suspension was authorized by law. The banks were at all times bound to pay their notes in specie at the nominal amount.

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on presentment at their bank, and not otherwise. And it is extremely questionable, when bank notes are paid and received, whether it can be averred that they would not have been paid on presentment, without presentment made. Until such presentment, there was no default, and the notes were not dishonored. But we have not thought it necessary to give an opinion upon this point, because we are all of opinion, that the bank notes being offered in payment at *par*, and not otherwise, the actual acceptance of them was an acceptance of them at their nominal *par* value, as tendered, and amounted to a payment.

Verdict set aside, and plaintiff nonsuit.

William B. Reynolds *vs.* The Ocean Insurance Company.

When an underwriter, who has refused to accept an abandonment of a stranded vessel, takes possession of the vessel *for the purpose of removing, repairing, and restoring* her to the owner, he is bound to use due diligence and despatch, as well in removing as in repairing her; and want of such diligence and despatch in removing her, operates as a constructive acceptance of the abandonment, although the repairs are afterwards made with reasonable despatch.

The underwriter's duty and liability, in such case, are not varied by a clause in the policy of insurance, that "the acts of the assurer, in *recovering, saving, and preserving* the property insured, in case of disaster, shall not be considered an acceptance of an abandonment"; such clause being inserted *diverso intuitu*.

This was an action upon a policy of insurance on the brig Gem, in which the plaintiff sought to recover for a total loss. The brig sailed from Philadelphia for Boston, on the 8th of April, 1837. On the evening of the next day, she struck on a shoal, which caused her to leak very badly; and she was, for that reason, voluntarily stranded for preservation of all concerned. She lay on the inside of Cape May Beach until the 20th of June following, when she was got off, under the direction of the defendants' agent, and carried to Philadelphia, where she arrived on the 24th of the same June, and was there repaired.

On the 20th of April, 1837, the plaintiff wrote a letter to the defendants, abandoning the brig, and claiming a total loss

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On the next day, the defendants informed the plaintiff that they did not accept said abandonment. On the 31st of July following, the defendants informed the plaintiff, by letter, that the brig was completely repaired, and ready to be delivered to his order, at Philadelphia. To this letter the plaintiff made no reply.

The policy contained this clause. "The acts of the assured or assurers in recovering, saving, and preserving the property insured, in case of disaster, shall not be considered a waiver or acceptance of an abandonment."

At the trial before *Dewey*, J., the plaintiff put his case on the ground that the defendants had, by operation of law, accepted the abandonment by unreasonable delay in getting off and repairing the brig. He admitted, that after the brig arrived at Philadelphia, the repairs were made with due diligence; but he alleged that the defendants took possession for the purpose of getting her off, repairing her, and restoring her to the owner, and thus discharging their contract; and that as they took possession to get her off, only as a necessary step in the repairs, they were bound to use due diligence as well in removing as in repairing her.

The defendants contended, that until the repairs were begun, they were not bound to use diligence and despatch, and therefore that if they were not duly diligent and prompt in removing the brig from the beach, and carrying her to a place of safety, yet this did not evince, nor amount to, an acceptance of the abandonment. They also contended, that there was no acceptance of the abandonment, if their measures, in attempting to remove the brig, were such as a prudent owner, uninsured, would adopt

The judge ruled, that if the defendants, after the abandonment and refusal to accept it, took possession and control of the brig, having at that time the actual purpose and design of getting her off, repairing, and restoring her to the assured, they were, from the time when they took possession for such purpose and with such intention, bound to use reasonable diligence as well in getting her off as in making repairs after her arrival in port; and that if they delayed beyond a reasonable time, they made themselves answerable as for a constructive acceptance of the aban-

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donment, and for a total loss. The judge also instructed the jury, that the mere act of entering upon the property for the purpose of recovering, saving, and preserving it, was not to be considered as an acceptance of the abandonment, and that the exercise of this right was not to charge the defendants, because such right was secured by a clause in the policy.

There was no evidence of any act done or offered, by the plaintiff or either of the owners, for the purpose of removing the brig from the beach.

The defendants contended, that until it should be proved that they took exclusive possession of the brig, for the purpose of getting her off and repairing her, and thus hindered and prevented the plaintiff from coöperating with them, the duty of diligence and despatch did not attach to them, and that therefore the want of such diligence and despatch did not evince, nor amount to, an acceptance of the abandonment. They also contended that until the commencement of the repairs, there was no such exclusive possession.

It was left wholly to the jury to find when the defendants took possession and control of the brig.

Much of the controversy, at the trial, related to the fitness of the persons employed by the defendants' agent to remove the brig, and to the judgment, vigor, and skill of their operations.

A general verdict was returned for the plaintiff, and the defendants moved for a new trial because of misdirection in matter of law.

Choate and *Crowninshield*, for the defendants.

C. P. Curtis and *B. R. Curtis*, for the plaintiff.

Shaw, C. J. The right of an insurer, after refusing to accept notice of an abandonment, and when the owners themselves have manifested their intention not to get off and repair the vessel, to take possession of her, and repair and restore her in a sound condition to the assured, is a peculiar privilege. This is not within the direct provisions of the contract of insurance, but it has been held as one of the incidental consequences of the relation arising out of that contract, that if the insurers can make the necessary repairs, and thereby show that the loss did not

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amount to fifty per cent. according to the computation made in adjusting a partial loss, and can tender the ship to the assured, restored and made whole, it is a good compliance with their contract of indemnity, and a good defence to a claim for a total loss. But it has been held as a strict condition, that this must be done within a reasonable time. And in the case of *Peele* v. *Suffolk Ins. Co.* 7 Pick. 257, where the rule itself is definitely laid down, it is said, "that underwriters must do this as expeditiously as possible, in order that the voyage, if it be not completed, may not be destroyed." And it is added, "if he delay the repairs beyond a reasonable time, he forfeits his right to return the ship, and must be considered as taking her to himself under the offer to abandon."

The defendants' counsel, at the trial, and again on the argument, admitting the rule to be so, in regard to the act of repairing, contended that until the commencement of the repairs at Philadelphia, the defendants were not bound to the duty of diligence and despatch, and therefore if they did not use due diligence in removing the vessel from the beach, and carrying her to a place of safety, it did not amount to an acceptance of the abandonment.

There is a clause in the policy, that no act done by the insurers, towards saving the property, shall be deemed to be a constructive acceptance of an abandonment; and hence it is argued, that whether the acts are done promptly and actively, or tardily and negligently, can make no difference, and that whatever may be the character of such acts, they are protected by the policy from being regarded as evidence of an acceptance of the abandonment. Supposing this view to be correct, still taking possession of the vessel, for another and distinct purpose, is not within this provision in the policy. The act is qualified by the intent and purpose with which it is done. If done solely with a view to save the property, the underwriters were at liberty to do such acts or not, as they should see fit, and do them in their own time. If done with an intent to repair and restore the vessel, then it was to be done with reasonable diligence and despatch, on peril of making the vessel their own, by taking her

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into custody. This was the view of the subject taken at the trial, and the jury were accordingly instructed, that if the insurers, after the abandonment and refusal to accept, took possession and control of the vessel, with the purpose and design of getting her off, repairing, and restoring her, they were bound, from the time they took possession with that intention, to use reasonable diligence, as well in getting her off, as in repairing her after her arrival in port. This instruction we think was correct; and the jury were sufficiently cautioned against any misapprehension on the subject, by the further instruction, that the mere act of entering on the property, for the purpose of recovering, saving, and preserving the property, is not to be considered as an acceptance of the abandonment.

The extent to which the acts of persons will be characterized, and their effect determined and governed by the intentions with which they are done, is nowhere more strikingly illustrated, than in the principles of insurance law. In many cases, acts done with one purpose will be justified, when the same acts, done with another, will vacate the policy. It has often been held, that it is no deviation to depart from a direct line, for any of the ordinary purposes of navigation; and if a master alters his course with any view to avoid a current, or to take the wind to better advantage, or any purpose connected with the navigation of the vessel, it is no deviation. But it was held, in *Parr* v. *Anderson*, 6 East, 202, where a master altered his course a quarter of a point, and pursued it a quarter of an hour, for the purpose of pursuing an enemy, when he had no liberty to chase or make prizes, that it was a deviation, which discharged the insurers. In all such cases, the purpose with which an act is done is a question of fact to be decided by a jury, upon evidence.

The ground, and the only ground, upon which the underwriters can defend themselves, in a case like the present, is, that they have restored, or tendered, the vessel to the assured, repaired and made whole, and fit for use, within a reasonable time. All the same reasons, which require reasonable diligence and despatch in actually making the repairs, apply with equal force to all the anterior proceedings incident and necessary to such restoration.

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These reasons are, that during the whole of the time, as well whilst getting the vessel off, as whilst the repairs are making, the voyage is delayed, the owners are deprived of the use of their vessel, and the insurers are withholding her, under a claim which can be justified only on the ground that they proceed with due diligence. Were it necessary to the decision of this case, we are inclined to think, that within the principle laid down on this subject, it is necessary, if the insurers intend to repair and restore the vessel, that they come to that determination and act upon it promptly, and that due diligence is as requisite to the engineering operations of getting the vessel from the strand, as the mechanical operations at the ship-yard, after she reaches it; because both are necessary to an actual restoration, within a reasonable time. It is to be regarded as one entire act, governed by the object and purposes with which it is done.

In the case cited, *Peele* v. *Suffolk Ins. Co.*, it was found by the jury, that the vessel was not repaired and offered to be restored in a reasonable time; and on this ground, the court decided against the underwriters, without distinguishing between the act of taking possession and getting the vessel off, and the act of making the repairs upon her, when removed. But it is not necessary now to decide what would be the effect of delay in taking possession. In the present case, the jury have found, that after the defendants took possession and control of the vessel, with the purpose and design of getting her off, repairing, and restoring her to the assured, they did not use reasonable diligence; and we are therefore of opinion, that the vessel was not tendered within reasonable time; that by the delay, the defendants forfeited their right to return her, and must be considered as having accepted the abandonment.

Judgment on the verdict.

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Elihu Reed *vs.* The Pacific Insurance Company.

One who procures insurance to be made, in his own name, for another person, or for whomsoever it may concern, cannot maintain an action on the policy, in his own name, if his authority is disavowed or revoked, before action brought, unless there is some express provision, in the policy, authorizing him to sue, or he has a lien or other interest, which the party whose property is insured cannot defeat.

One who thus procures insurance on a vessel, not as a broker or general agent, out in pursuance of a specific order, and under directions to forward the policy to the party who gives the order, has no lien on the policy, nor interest in it. And though he be ship's husband for the general management of the vessel insured, yet he has no lien on the policy for the balance of his account.

This was an action on a policy of insurance on the brig Lowell, dated November 9th, 1836, effected by "Elihu Reed for Elias Reed, or whom it concerns," for two thousand dollars. The writ was sued out and served on the 17th of November, 1837. The declaration contained an averment, "that the said policy was so effected by the plaintiff, as agent for, and by the authority of, the said Elias Reed, and that he had a lien on the same for his advances and liabilities incurred on account of the said Elias." There was no other averment in the declaration that said Elias was indebted to the plaintiff, or that the plaintiff had incurred any liabilities on his account.

The defendants admitted that a total loss had occurred, for which they were answerable, deducting the salvage.

To support the plaintiff's claim, at the trial, he introduced a letter, written to him by Elias Reed, as follows: "Richmond, 3d November, 1836. Elihu Reed, Boston. Your letter of the 29th October is at hand. On receipt of this, I wish you to get $2,000 insured on the Charles for one year, for whom it may concern, with the usual privileges. I also wish you to get $2,000 insured on my half of the Lowell for one year, with the privilege that she has had heretofore when insured in Boston, and have it done for whom it may concern. Send the policies as soon as convenient." The plaintiff also introduced letters written to him from Richmond by said Elias, in which were these passages: "November 17th, 1836. Your letter of the 12th is at hand. I am glad to learn you have got the insurance on the

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Lowell and Charles at eight per cent., for they would not do it here for nine per cent., although I think the risk a good one for any office." "December 8th, 1836. Your letters of the 12th November, and 3d December, are at hand. In yours of the 12th November, you inform me that you have insured the Charles and Lowell $2,000 on each, agreeably to my order, at eight per cent. per annum. You do not say exactly the day you had it done. Since the Lowell is lost, it may be of great importance to me to know the time you made the insurance."

The defendants proved, that after the loss, viz. on the 7th of February, 1837, the claim against them for the loss was assigned by Elias Reed to Henry Clarke of Richmond, for a valuable consideration; that on the 13th of said February, a demand was made on the plaintiff, by A. Stevens, a duly authorized agent of said Clarke, for the delivery of the policy to him for said Clarke; and that at the time of this demand, the said agent exhibited to the plaintiff an order from Elias Reed, as follows: "Mr. Elihu Reed will please deliver to Mr. A. Stevens the policy of insurance for brig Lowell, Captain Reed, that you had effected in Boston for my account on the 9th November last, and oblige yours, &c. Richmond, 7th February, 1837:" That the plaintiff refused to deliver the policy to Stevens, stating that there was an account between him and Elias Reed, and that he should retain it until that account should be settled: That notice was given to the defendants, on said 13th of February, by said Stevens, on behalf of said Clarke, not to pay to the plaintiff, and they were also required by said Stevens to pay to him or to said Clarke, and to no one else.

On the 9th of January, 1838, the following letter from Elias Reed was received by the plaintiff. "Richmond, December 23, 1837. Mr. Elihu Reed. Sir; Understanding that you have commenced a suit against the Pacific Insurance Company to recover a loss under a policy effected by you for me, you are hereby notified that I entirely disavow said suit, and declare that the same was commenced without my knowledge and consent, and contrary to my wishes, as I had, on the 7th of February last, assigned my interest under said policy to Henry Clarke, of which

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transfer you were notified by A. Stevens, a few days after it was made."

The defendants gave in evidence two letters from the plaintiff to Elias Reed, in which were these passages. "Boston, November 12, 1836. Your favor of 3d November came duly to hand. I have insured the Lowell and Charles $2,000 each at 8 per cent. This is very low for the Charles. I paid 4½ for the six summer months while I owned her, and many of the old offices have declined writing vessels on time. They are written 'Elihu Reed for Elias Reed and whom it concerns.'" — "Boston, December 13, 1836. Your favor of 8th inst. is received. The policies on the Charles and Lowell were executed on the 9th of November, to take effect from their several days of sailing, for one year, viz. the Charles for one year from the 1st of November, and the Lowell from the 27th day of October, for account of whom it might concern on those days. I abandoned the Lowell on the 7th of December, and claimed for total loss. I presume the Lowell stood in your name at the time of loss."

The defendants also proved that the plaintiff, after the loss of the Lowell, viz. on the 13th of February, 1837, brought an action against Elias Reed, in the court of common pleas, and summoned the defendants as trustees of said Elias; which action was subsequently discontinued as to the trustees, before this suit was commenced.

The plaintiff introduced his son, E. H. Reed, as a witness, who testified that the plaintiff and Elias Reed were partners in 1828 and 1829, when the brig Lowell was new, and that their partnership was dissolved in 1830: That the brig, being owned by them jointly, continued to run on joint account, the plaintiff acting as ship's husband up to the time of the loss: That the accounts had always been kept at Boston; that the witness kept the books, and had made up the accounts to December 31st, 1836, and that a balance of $3676·81 was due to the plaintiff; that though other transactions were included in this account, besides those of the Lowell, yet that the principal part of it related to that brig, and that if the items, not relating thereto, were

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stricken out, the balance in favor of the plaintiff would be larger: That the account was made up since the dissolution, and included no partnership transactions: That the Lowell had been freighting, nearly half the year, between Richmond and Boston, but, during the winter, Elias Reed made up West India voyages from Richmond, and that said Elias had the earnings of three or four voyages, for which he had rendered no account.

Upon this evidence, it was insisted for the plaintiff, that he had such a lien on the policy as enabled him to maintain the action, notwithstanding the acts and claims of Elias Reed, and Clarke his assignee. The defendants denied that the plaintiff had any lien on the policy, or if he had any lien, or right to detain it, that he could maintain an action upon it contrary to the direction of Elias Reed or his assignee.

The judge directed a verdict for the plaintiff, for $2,000, (for the purpose of bringing the questions in the case before the court,) which is to be altered, and judgment entered for the true amount of the loss, if the court shall be of opinion that the action can be maintained; and which is to be set aside and a nonsuit entered, if the court shall be of opinion that this action cannot be maintained.

F. C. Loring, for the plaintiff. The defendants cannot be allowed to deny the plaintiff's right to maintain this action. He has a right to sue, wherever the actual interest may be. *Davis* v. *Boardman*, 12 Mass. 80. *Ward* v. *Wood*, 13 Mass. 539. *Mauran* v. *Lamb*, 7 Cow. 174. 1 Chit. Pl. 5. *Res inter alios actæ* cannot be brought into the defence.

If it be objected that, as the plaintiff detained the policy, instead of forwarding it to Elias Reed according to order, he had no lien upon it, the answer is that insurance was made according to order, and Elias Reed expressed his satisfaction, and made no complaint that the policy was detained, thereby waiving his order to forward it.

As Elias Reed was indebted to the plaintiff, chiefly for disbursements, &c. on the Lowell, or in connexion with her, the plaintiff may well maintain this action. Story on Agency, 385. 389. 2 Phil. Ins. (1st ed.) 364.

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The plaintiff has not waived his lien by suing out the trustee process. When goods are attached by order of a party who has a lien upon them, the lien is perhaps waived, as the goods are taken away. *Swett* v. *Brown*, 5 Pick. 178. But it is otherwise in case of a trustee process. *Curtis* v. *Norris*, 8 Pick. 280. Besides, it is a question of fact whether the plaintiff intended to waive his lien. *Townsend* v. *Newell*, 14 Pick. 332.

The disavowal of the suit by Elias Reed, after he had assigned his claim, was wholly inoperative. But he had no authority, at any time, to disclaim the suit. The plaintiff had a right to insure, and to retain and sue the policy; and as agent, having a lien, he had a right to use the means necessary to secure the benefit of his lien. Story on Agency, 92, 93, 180.

Fletcher and *Sewall*, for the defendants. As the plaintiff and Elias Reed were joint owners of the Lowell, the plaintiff was not a factor of Elias, and had no lien on the policy. Story on Agency, 32. *Thorndike* v. *De Wolf*, 6 Pick. 125. *Merrill* v. *Bartlett*, 6 Pick. 46. *Braden* v. *Gardner*, 4 Pick. 456. The plaintiff was, at the most, an insurance broker, and had a lien only for the balance, if any, of his insurance account. *Olive* v. *Smith*, 5 Taunt. 56. Paley on Agency, 111. 2 Livermore on Princ. & Agent, 80. And even if the plaintiff were factor, the policy did not come into his hands as such, nor was any thing due to him as such, and therefore he had no lien. *Stevenson* v. *Blakelock*, 1 M. & S. 535. Whitaker on Lien, 31, *note*. Montagu on Lien, 34. See also *Holdernes* v. *Collinson*, 7 Barn. & Cres. 212. Story on Agency, 377. A large part of the plaintiff's claim against Elias Reed, as appears on the face of his account, is for unliquidated damages; as for "*fair* charter of the Lowell," &c.; and there can be no lien for such claims. *Phillips* v. *Rodie*, 15 East, 547.

In this case, no lien could accrue to the plaintiff, as he was directed to insure *and send on* the policy. His detention of the policy was tortious, and gave him no rights. *Burn* v. *Brown*, 2 Stark. R. 272. *Hall* v. *Marston*, 17 Mass. 575. 2 Selw. N. Prius, (4th Amer. ed.) 542. 2 Livermore on Princ. & Agent, 51.

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The contract of the defendants was not with the plaintiff, and he cannot maintain this action against the will of Elias Reed. He could not have settled with the defendants, even before the assignment, without authority from Elias. A mere lien on a bond or other contract gives no right to sue, but only a right to detain. Paley on Agency, 107, 108. Story on Agency, 364. Yelv. 67 *g*, *note*.

Shaw, C. J. Although, by usage, one who procures insurance to be made, in his own name, for another person or whomsoever it may concern, may maintain an action in his own name, *Davis* v. *Boardman*, 12 Mass. 80, and *Ward* v. *Wood*, 13 Mass. 539, yet it is upon the presumption that his agency is continued, and not disavowed by the party in real interest. But such person is deemed a mere agent and trustee for the party interested, and if, before suit brought, his authority is disavowed or revoked by the party interested, he cannot maintain an action, unless he shows some express provision, such as "payable to him in case of loss," or some lien or other interest, which the party interested cannot defeat. *Copeland* v. *Mercantile Ins. Co.* 6 Pick. 198.

In this case, the insurance is in terms made for Elias Reed, and the facts show that it was made by his order, to cover his interest. The policy therefore enures to his benefit, and the right of action follows it. He therefore had a right to assign the policy and his right to recover a loss thereon, as a chose in action, to Clarke. He did so assign it, and gave notice thereof to the defendants. The right and authority of the plaintiff to sue for Elias, was thereby superseded. Nor does he appear to have any interest of his own in the policy. The insurance was made by him, not as a broker or general agent, but in pursuance of a specific order, by which he was requested to procure the insurance and forward the policy. By undertaking to execute the order, he bound himself to comply with the terms, and forward the policy; and this precludes the supposition, that he was to have any lien upon it, or interest in it. As ship's husband, for the general management of the vessel as a freighting vessel, he had no lien upon this policy for his balance. If he gave his own note for

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the premium, which does not distinctly appear, it would probably make no difference; because, by the terms of the policy, the premium is to be deducted from the loss, to whomsoever it may be paid.

Plaintiff nonsuit

Ebenezer Johnson *vs.* Charles P. Sumner.

Under the Rev. Sts. *c.* 90, § 79, which provide that when mortgaged goods are attached, "the mortgagee shall, when demanding payment of the money due to him, state, in writing, a just and true account of the debt or demand for which the property is liable to him, and deliver it to the attaching creditor or officer," the mortgagee may include interest, as well as principal, in such account. And he does not render his account untrue, by understating the amount of interest, if his securities are not in his own hands, or he has not the means of computing the interest exactly.

Where a balance, remaining due on a note, is the debt for which mortgaged goods are liable, the mortgagee may well state, in such account, the single sum to which the debt is reduced. But where a mortgage is on condition to secure several demands described in general terms, a statement of the result, composed of the aggregate of several distinct demands, is not a just and true account.

Where goods are mortgaged to secure performance of any other obligation than the payment of money, it seems that the only mode of attaching the goods is by summoning the mortgagee as trustee of the mortgagor, according to the provisions of the Rev. Sts. *c.* 109, §§ 25, 26.

A mortgagee of goods, immediately after they were attached, made a demand and stated an account which were informal and ineffectual, and brought an action against the attaching officer, which he prosecuted for thirteen months, and then became nonsuit. Fourteen days before he thus became nonsuit, he delivered to the attaching creditor and officer a just and true account, according to law, of the debt for which the goods were liable, and demanded payment. *Held*, that this last demand was, under the circumstances, within a reasonable time.

In an action of trover, the rule of damages is the value of the goods at the time of conversion, and interest thereon from that time.

Trespass upon the case against the sheriff of Suffolk for an alleged wrongful taking and conversion, by one of his deputies, of seventy-one thousand feet of pine boards. The writ was dated June 5th, 1838.

At the trial before *Wilde*, J., the plaintiff proved a mortgage of said boards made to him, November 18th, 1836, by Nathan Frost, and duly recorded, to secure payment of a promissory note for $ 4,000, payable in six months He also proved that

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said boards were attached by a deputy of the defendant, on the 4th of January, 1837, as the property of Merritt & Bush, on a writ sued out against them by Harris & Jones; that the plaintiff commenced an action against the defendant, on the 7th of said January, for taking said boards, and prosecuted the same until the 10th of May, 1838, when he became nonsuit, in consequence of the ruling of the judge, who sat in the hearing, that the notice given by the plaintiff to the defendant of his claim under the mortgage, was not such as entitled him to maintain said action; that on the 26th of April, 1838, the plaintiff made a demand in writing upon the defendant, and his deputy who attached the boards, and upon Harris & Jones, for a delivery thereof, and set forth the debt or demand for which said property was liable to him, as follows: "I claim to own, hold, and possess said boards, as mortgagee thereof, by virtue of a mortgage from Nathan Frost, to me, dated November 18th, 1836, given by said Frost to secure to me certain sums of money due to me from him, and to save me harmless and indemnified against certain liabilities by me before that time assumed for him. The amount of money due to me from said Frost, at the time of the taking of the boards [by the deputy sheriff,] was $ 858, and the whole of said sum still remains due to me from said Frost, and I was at the same time liable as surety, guarantor, or joint promisor, to pay, for and on account of said Frost, three promissory notes, amounting in all to $ 1,525, which notes are still outstanding and unpaid; and I am still liable to pay the whole of that sum, by reason of my liability on said notes. At the time of the making of said mortgage, and of said taking [by the deputy sheriff,] I was liable for sundry other large sums on account of said Frost, from some of which I have since been relieved. I therefore demand of each of you the aforesaid sum of $ 858, with interest from the taking of said boards, and I further demand to be secured and held indemnified against all my liability on said three notes, amounting in all to the said sum of $ 1,525."

The plaintiff proved the facts alleged in the above statement. But it appeared that the sums which Frost owed him, and for which he was liable as surety or indorser for Frost, amounted, at

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the time of the attachment, to $ 1,490 only, exclusive of interest, and that by adding the interest, the sum was a little more than $ 1,525.

It was admitted by the plaintiff, that he was never in possession of the boards, and that Frost sold them, through the agency of a broker, to Merritt & Bush, who had no actual notice of the mortgage, and to whom the name of Frost was not made known; and that they gave to the broker their promissory note for the price.

The boards were afterwards, by consent of Merritt & Bush and their other attaching creditors, sold at auction by the deputy who attached them. Previously to the sale, the plaintiff gave written notice to said deputy that the boards belonged to him, and forbade the sale.

The defendant objected to the plaintiff's right to recover, because the notice given on the 26th of April, 1838, was insufficient and void, as it was not given in a reasonable time after the attachment; and the amount demanded and specified therein was larger than that which was actually due to the plaintiff, and for which he was liable on Frost's account at the time of the attachment. This objection was overruled by the judge.

The defendant denied that the plaintiff was entitled to recover interest on the value of the boards, except from the date of the second notice. But the judge ruled that he was entitled to interest from the date of the attachment, and the jury returned a verdict for the plaintiff for the sum of $ 852·33, and interest, according to the judge's instructions, amounting to $ 102·30, which is to be set aside, and the plaintiff become nonsuit, or be reduced so as to include the proper amount of interest, as the court shall order.

Several exceptions, which were taken at the trial, were waived by the defendant's counsel, at the opening of the argument.

I. J. Austin, for the defendant. The Rev. Sts. c. 90, § 79, require that a mortgagee of chattels which are attached "shall, when demanding payment of the money due to him, state in writing a just and true account of the debt or demand for which the property is liable to him." In this case, no account was

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stated. Notice was given of the amount of a mere balance of accounts. The attaching creditors had a right to see the items. It is no answer to this objection, that the statute gives redress against a mortgagee who demands and receives more than is due to him. It was the design of the statute to enable the attaching creditor to avoid the risk of paying more than is due. *Allen* v. *Clark*, 17 Pick. 54.

The notice was uncertain as to the amount of the plaintiff's liabilities for Frost. The attaching creditors could not have tendered indemnity against this uncertain part of the statement.

But if the notice contained an account, and an intelligible one, yet it was not "a just and true account." The case shows only $ 1,490, yet the plaintiff demanded payment and security to the amount of $ 1,525.

The statute on which this case rests should receive a strict construction, like the *St.* of 1786, *c.* 21, as to the statement of a demand annexed to a rule of reference. *Jones* v. *Hacker*, 5 Mass. 264. *Mansfield* v. *Doughty*, 3 Mass. 398. *Bullard* v. *Coolidge*, 3 Mass. 324.

The statute prescribes no time within which the mortgagee must make demand and give notice. He must therefore do it within a reasonable time. Fifteen months had elapsed in this case, and it was the plaintiff's fault that his first notice was insufficient.

As the attachment was rightful, the defendant is liable, if at all, only for detaining the boards after legal notice of the plaintiff's claim. Interest should therefore be taken only from the time of the last notice.

H. H. Fuller, for the plaintiff. The object of the statute is, not to give an attaching creditor time to investigate the accounts between the mortgagee and mortgagor, but to give him information as to the amount which he must pay, and a remedy against the mortgagee, if he demands and receives more than is his due.

The rendering of an account is a matter *in pais*, and need not be according to judicial forms. The account was as particular as the nature of the relation of the parties would permit. The interest on the sums due, &c. makes up more than $ 1,525;

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and even if there had been a mistake of a few dollars, the court would not deprive the plaintiff of his rights.

As the defendant has neither paid nor tendered any sum, the statute does not intend that the mortgagee's claim shall be discharged in consequence of his not giving due notice.

The verdict should include interest on the value of the boards from the time of the attachment. The defendant, after demand and notice, became a trespasser *ab initio*. *Oxley* v. *Watts*, 1 T R. 12. Yelv. 29 *d*, *note*. *Dye* v. *Leatherdale*, 3 Wils. 20.

J. T. Austin, (Attorney General,) replied.

Shaw, C. J. This was an action against the late sheriff, for a quantity of lumber attached by one of his deputies, and claimed by the plaintiff as mortgagee. We had supposed, during the argument, that in form it was trespass *de bonis asportatis*; but on reference to the declaration, and also to the report, it appears to be trover, with a special count in case, on the facts. No question is made respecting the form of action, and nothing is open, except the points reserved on the trial.

Before proceeding to consider the exceptions taken by the defendant's counsel, it may be proper, in order to prevent misconception, to make a remark upon the terms of the plaintiff's notice. He claims to hold the boards by virtue of a mortgage bearing date November 18th, 1836, "given by said Frost to secure to me certain sums of money due to me from him, and to save me harmless, &c." We at first supposed, that this was the form of the condition of the mortgage, viz. to pay certain sums of money, and to indemnify against actions, liabilities as surety, &c. Had such been the condition of the mortgage, it is very doubtful whether the goods could be specifically attached, by virtue of the Rev. Sts. *c*. 90, §§ 78, 79. All the provisions of this statute seem framed on the assumption, that the property stands pledged or mortgaged for the payment of money, and nothing more. The officer or attaching creditor, therefore, can discharge the lien by the payment of the money due; but the condition being to indemnify, or perform some other collateral act, there seems no mode indicated by which the condition can be performed.

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This is strengthened by another provision in Rev. Sts. c. 109, regulating the trustee process. It is provided, § 25, that if the goods, in the hands of the person summoned, are mortgaged or pledged for the payment of any debt, the attaching creditor may pay or tender the amount due, and thereupon the trustee shall deliver the goods. And by § 26, if the goods, in such case, are held for any purpose other than to secure the payment of money, and the condition or thing to be performed is such as can be performed by the attaching creditor, the court may make an order for the performance of it by him, and thereupon the trustee shall deliver the goods, &c.

Taking both modes of attaching, and the statute provisions applicable to each, we are strongly inclined to the opinion, that when goods are mortgaged to secure the performance of any other obligation than the payment of money, the only mode of attaching the property is by summoning the mortgagee as trustee. We make this suggestion, lest it might be inferred from the notice, that the condition of the mortgage, in this case, was to indemnify the mortgagee as well as to pay money, and yet that the goods were specifically attached.

But upon a reference to the mortgage, it appears that the only condition was, to pay a large sum of money, and so it seems to have been understood at the bar; and the question was, what sum of money, or rather what part of such large note was due at the time of the attachment. Whether the mortgage could be available for any thing but money due to the plaintiff, it is not now necessary to inquire; because the amount of money due to the mortgagee, independent of liabilities, exceeded the value of the mortgaged property, as found by the jury.

Coming then to the questions reserved at the trial, several of them are waived, and the only one relied upon is the sufficiency and seasonableness of the notice, given by the plaintiff to the attaching officer and creditor, of the amount due on the mortgage. The exception taken at the trial was, that the precise sum due was not stated; that is, a sum neither more nor less than the sum due; but that the amount demanded was larger than the amount due.

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As it applies to the sum due to the plaintiff in cash, the sum was proved as stated. Had the mortgage been made on condition to secure several demands described in general terms, we think a statement of the result, composed of the aggregate of several distinct demands, would not have been a just and true account, within the meaning of the statute. But this was the part remaining due on a larger note, for which the mortgage was made; and we think it was sufficient to state the single sum to which the debt was reduced by payments or otherwise.

As to the amount for which the plaintiff was liable as surety, guarantor, or indorser, the opinion of the court is, that it was not for a larger sum than the amount due, and so not open to the exception taken to it. The account is to be of the debt or demand, for which the property is liable to the mortgagee; and such an account may well include interest as well as principal. And such including of interest would not render the account untrue; and as the mortgagee renders himself liable for a penalty, if he states his account for more than is due to him and receives it, we think he may understate the amount of interest, when the securities are not in his own hands, and when he has not the means of computing the interest exactly, without rendering his account subject to the imputation of being untrue. In the present case, the amount stated in the demand and account was less than the amount actually due, computing the interest on the notes.

As to the exception, that the demand was not made within reasonable time, we have felt much more difficulty. Somewhat more than a year elapsed, from the attachment to the time of the last and effectual demand. If there were nothing to account for and explain this delay, we should think it was not made within reasonable time. But there are several circumstances tending to excuse it. There was an early, though an informal demand, but sufficient to inform the officer and attaching creditor of the existence of the plaintiff's mortgage and put them on inquiry; and it was stated at the bar, and known to some of the court, that a former action was brought. The action, in which the attachment was made, was still pending, when the last demand of the plain-

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tiff was made. On the whole, under the circumstances of the case, the court are of opinion, that the demand of the plaintiff was made within reasonable time.

The point of interest we think is easily disposed of. It was argued that the defendant was chargeable as a trespasser *ab initio*, and so should be liable for interest from the first taking. And from the terms of the report, we are inclined to think that the case was presented to the court as a trespass, because the defendant contended that if the plaintiff was entitled to recover, he could lawfully claim interest only from the last demand, and not from the day of the supposed tortious taking; but the court ruled otherwise. But we think the form of the action is decisive. It is trover, and charges no tortious taking. The conversion relied on, is that following the last and effectual demand in April, 1838. And then the well settled rule of damages in trover applies; the value of the goods at the time of the conversion, and interest from that time. *Kennedy* v. *Whitwell*, 4 Pick. 466. The verdict is to be amended by computing the interest from that demand; after which, judgment is to be rendered on the verdict for the plaintiff.

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John F. Dyer *vs.* Otis Rich & others.

In declaring on a promise to pay money, on demand, if a third person shall fail to do a certain act, it is not necessary to aver a special demand before action brought.

A promise that one shall receive a certificate of ten shares of the corporate stock of a certain manufacturing company whose capital shall be one hundred thousand dollars, divided into not more than two hundred shares, is not fulfilled by a tender of a certificate of ten shares of the stock of said company, of which only thirty-five thousand dollars are paid in, divided into seventy shares.

The rule of damages, for breach of such promise, is the value of ten shares in the full capital stock, if it had been made up at the time stipulated, and the company had been then ready, in good faith, to operate upon such capital, pursuant to their charter.

Where a party to a written agreement to pay money, &c. recites therein, as the consideration of his promise, that the promisee had made a conveyance, of even date with said agreement, to a third party, the promisor is estopped to object, for the purpose of showing that such conveyance was inoperative and not a good consideration for his promise, that it was not made until a subsequent day, although such conveyance may in fact bear date of a subsequent day.

It is not necessary to the validity of a patent, that the patentee should take the oath prescribed by law, before the letters patent are granted.

This was an action of assumpsit, commenced January 25th, 1838, upon the following agreement made with the plaintiff by the defendants, bearing date January 22d, 1836: "Know all men to whom these presents shall come. John F. Dyer, of the city of Providence, in the State of Rhode Island, at our instance and request has, by his *deed bearing even date herewith*, sold and assigned unto the Rockingham Manufacturing Company, a corporation established by law within and by the authority of the State of Vermont, all his right, title, and interest in and to a new improvement in the damask loom, so called, for which letters patent were issued to Patrick McGilroy and Abner S. Tompkins, bearing date the ninth day of May last, as by reference to said deed will appear; in consideration of three promissory notes, bearing even date herewith, signed by Lemuel Blake of said Boston, merchant, and payable to his order and indorsed by him, one for the sum of six hundred and twenty-five dollars, payable in sixty days, one for the sum of nine hundred and thirty-seven dollars and fifty cents, payable in six months, and the other for nine hundred and thirty-seven dollars and fifty cents, payable in twelve months, and ten shares in the corporate stock

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of said Manufacturing Company, and of the guaranty hereinafter contained :

"Now, therefore, in consideration of the premises, we do hereby jointly and severally promise and agree to and with the said Dyer, his executors, administrators, and assigns, that the said Blake shall and will well and truly pay, or cause to be paid, the said three promissory notes, at the times when they shall respectively become due ; and upon his neglect or refusal so to do, we will pay the said Dyer, his executors, administrators, and assigns, to the full amount of the said notes, or such of them as shall not be paid as aforesaid, with interest and all costs and expenses which he or they shall incur or be put to by reason of such non payment.

" And for the same considerations, we do jointly and severally promise and agree to and with the said Dyer, his executors, administrators, and assigns, that he or they shall, *within two years* from the day of the date hereof, receive certificates of ten shares of the corporate stock and estate of the said Rockingham Manufacturing Company, with a sufficient receipt, within or accompanying the same, of the payment of the full par value thereof, to wit, of the sum of $ 500 on each share ; and that, within the said term of two years, a capital stock shall be paid in by the other stockholders of said company, which, in addition to the agreed value of said patent right, estimated at $ 20,000, shall make the whole capital $ 100,000 ; and that the shares into which the said stock shall then be divided, including the said ten shares, shall not exceed two hundred, each of the actual value of $ 500 ; and that if, at the expiration of the said two years, the capital stock actually paid in, including the agreed value of said patent right, shall not be equal to the sum of $ 500 on each share then issued, we will forthwith, *upon demand*, pay to the said Dyer, his executors, administrators, and assigns, such further sum or sums of money as, in addition to those which shall have been paid in as aforesaid, shall amount to the sum of $ 500 on each of said shares."

The declaration, after setting forth said agreement, concluded thus : " And the plaintiff avers that though said two years have elapsed, he has not received a certificate of ten shares of said

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corporate stock, with a sufficient receipt of the payment of the par value thereof, to wit, of the sum of five hundred dollars on each share ; nor has a capital stock been paid in, which, with the agreed value of said improvement, as aforesaid, would make the whole capital equal to one hundred thousand dollars. By reason of all which, and of their promise aforesaid, the said defendants have become liable to pay to the plaintiff such sums of money as, in addition to those paid in, would amount to the sum of five hundred dollars on each of said ten shares, to wit, the sum of five thousand dollars. Yet, *though requested*, they neglect so to do."

Three only of the defendants made defence ; the others were defaulted.

From the report of the case, by *Morton*, J., before whom the trial was had, it appeared that the plaintiff proved the execution of the agreement declared on, and rested his case. Whereupon the defendants' counsel requested the judge to instruct the jury that the plaintiff was not entitled to recover, because he had not alleged nor proved any demand on the defendants before action brought ; but the judge refused so to do, and ruled, that the defendants must prove performance of the stipulations in their said agreement, although no demand had been shown ; to which the defendants excepted.

The defendants then introduced the original letters patent, mentioned in said agreement, granted to McGilroy and Tompkins, the patentees ; and it was proved, that said patentees, on the 8th of June, 1835, conveyed all right, which they had acquired, by said letters, to the exclusive use of the improvement therein named, to Carrington & Cozzens, who conveyed the same, on the 11th of September, 1835, to Benjamin Leeds. The defendants also introduced a conveyance by the plaintiff to the Rockingham Manufacturing Company, dated January 28th, 1836, (*six days after the date of the defendants' agreement*) of all his title and interest, being an undivided half, in and to the improvement in the damask loom, for which said letters patent were granted. It was also proved, that one undivided fourth part of said improvement was conveyed to said company, by W. H. & G. L Montague, on the 22d of January, 1836, and one undi-

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vided fourth part thereof, by Benjamin Leeds, on the 28th of said January.

The letters patent were granted to McGilroy, who, it was stated therein, had resided two years within the United States, and to Tompkins, a citizen of the United States. It was recited in said letters, that the patentees stated, that said improvement had not been known or used, before their application, and that they had made oath, "that they verily believed that they were the true inventors or discoverers of the said improvement."

It was in evidence, that the plaintiff's interest in the stock of the Rockingham Manufacturing Company, and in the aforesaid agreement of the defendants, was assigned, on the 17th of June, 1836, to W. H. & G. L. Montague, and by them subsequently, prior to the 19th of January, 1838, conveyed to the Chelsea Bank as collateral security for the liabilities of said Montagues to said bank.

It was admitted that C. G. Loring, Esq., on the 19th of January, 1838, was the authorized agent and trustee of said Chelsea Bank, and of said Montagues. It was also admitted, that Otis Rich, as treasurer of the said Rockingham Manufacturing Company, on the 19th of January, 1838, tendered to said Loring, for the benefit of the Chelsea Bank, or whom it might concern, a certificate of twenty shares in said company, and a receipt, copies of which are in the margin; * ten of said shares

* Rockingham Manufacturing Company, No. 16.

Be it known, That of is the proprietor of twenty shares, numbered one hundred and sixty one to one hundred and eighty, of the real and personal estate of the Rockingham Manufacturing Company, incorporated by the Legislature of Vermont, November 10th, 1835, subject to such conditions as are contained in the act of incorporation, and in the by-laws of the Company, and transferable by deed, under seal, and acknowledged before a justice of the peace, and recorded by the clerk.

L. S. In witness whereof the seal of the Corporation is hereunto affixed this eighteenth day of January, A. D. 1838.

Henry F. Green, President.

Otis Rich, Treasurer.

Recorded, Lemuel Blake, Clerk.

Boston, January 18th, 1838. This is to certify, that there has been paid in the full par value of five hundred dollars per share, on twenty shares of the

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having been intended as and for the ten shares claimed by the plaintiff; which certificate the said Loring, on behalf of said bank, declined to receive, assigning as a reason, that in his opinion, the capital of said Rockingham Manufacturing Company had not been paid in, in compliance with the stipulations of the defendants.

The defendants introduced a copy of the charter of the Rockingham Manufacturing Company, duly certified, by which it appeared, that said company was incorporated by the legislature of Vermont, on the 10th of November, 1835, and that Alexander Fleming was authorized to call the first meeting of said corporation.

Henry F. Green, a witness called by the defendants, produced a record of the doings of said corporation at their first meeting, and stated that he acted as secretary of said meeting, and made the record produced by him, at the time of said meeting. From this record it appeared that the first meeting of said corporation was held on the 10th of February, 1836, in pursuance of a notice signed by the aforesaid Alexander Fleming, which notice was dated 29th January, 1836. It also appeared from the record, that at said first meeting it was voted to accept the aforesaid charter, and that other measures were adopted for the organization of said company.

It was admitted, that certificates of a number of shares, no exceeding seventy, including the twenty tendered as aforesaid, had been issued; and that, upon a portion of said shares, money had been paid in, to an amount not exceeding $ 25,000, of which in the whole $ 10,000 had been appropriated to the payment of the notes given by L. Blake, one of the defendants, to the plaintiff and others, on account of the purchase of the patent, in pur-

capital stock of the Rockingham Manufacturing Company, numbered one hundred and sixty one to one hundred and eighty. Said shares are given in satisfaction of bonds, given to the proprietors of the patent damask loom, on the purchase of the same by the Rockingham Manufacturing Company; and the treasurer has been duly authorized to certify that all assessments have been paid on the same.

Otis Rich, Treasurer, &c.

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suance of a vote of the directors or stockholders of said company, passed immediately after the execution of the agreement on which this suit is founded. This, the defendants contended, made the amount of capital paid in, estimating the patent at $ 20,000, according to the stipulations of the agreement, to be $ 35,000, and made the seventy shares issued, shares of the par value of $ 500, according to said stipulations.

It was also admitted, that the aforesaid letters patent were delivered to the defendants with the deeds of the plaintiff and Leeds, and the Montagues, and were in the possession of the Rockingham Manufacturing Company, after the acceptance by them of their charter, and until and at the time of the trial; also that they had used the aforesaid supposed improvement in the damask loom.

The defendants contended, that as the plaintiff's deed was not dated and acknowledged, until the 28th of January, 1836, and the Rockingham Manufacturing Company, the grantee therein named, was not organized under its charter, until the 10th of February following, and the agreement of the defendants, produced by the plaintiff in support of his action, bore date on the 22d of January, 1836, the plaintiff's said deed was no consideration for the defendants' promise, made on the 22d of January; and that the agreement in suit was wholly without consideration and void.

The defendants also contended, that the aforesaid letters patent were void, because the alleged patentees had not taken the oath required by the laws of the United States, as a prerequisite to the issuing of valid letters patent; so that the consideration of the defendants' promises had failed, and the plaintiff was not entitled to recover.

The defendants also contended, that as the plaintiff had assigned his interest in the aforesaid agreement of the defendants, before the expiration of the two years therein named, and had not in his declaration negatived performance to his assigns, that he was not entitled to recover.

The defendants also contended, that the aforesaid contract of

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the defendants appears upon the evidence in the case to be a stock-jobbing transaction, and as such was illegal, and that the plaintiff could not recover thereon.

The defendants also contended, that the par value of $500 had been paid in, including the agreed value of the improvement in the damask loom, upon each of the seventy shares which had been issued; and that this was a substantial performance of the contract, and that therefore the plaintiff was not entitled to recover.

The judge was requested, by the defendants' counsel, to rule all these points in their favor; but he declined so to rule on either of the points, reserving all of them for the opinion of the whole court.

The judge instructed the jury, that the only question for them was the amount of damages; that for the purpose of the present trial, $20,000 must be assumed to be the true value, as well as the agreed price, of the patent; of which price $10,000 was payable in cash, and $10,000 in stock of the company, to which the patent was to be conveyed; that by the defendants' agreement, the capital of this company was to have been $100,000; $20,000 in the patent, and $80,000 in cash paid in; and this capital was to have been divided into 200 shares of $500 each, of which shares the plaintiff was to have ten; that a certificate of ten shares with the requisite formal evidence of the payment of the capital, as stipulated in the agreement, having been duly tendered, this part of the contract was literally complied with, and consequently the legal title to the ten shares must be considered as vesting in the plaintiff by the tender. But that another part of defendants' agreement was, that the whole capital should be paid in, in the manner above stated; that this part of the agreement was broken, and the question was, what damages the plaintiff is entitled to, if any, beyond the real value of the ten shares at the time of the tender. It being agreed that there was a capital of $15,000 in cash paid in, besides the patent, estimated at $20,000, which was conveyed to the company, there was, in effect, $35,000 paid in, out of $100,000 which was agreed to be paid, leaving a deficiency, when the shares were tendered, of 65–100ths of that capital which had

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been agreed for; that the true rule of damages would be such as would place the plaintiff in as good a situation as he would have been in, if the defendants had performed their whole agreement; and that the jury should inquire, therefore, what would have been the additional value of the ten shares tendered, if the whole capital had been paid in. In the absence of other proof, the presumption would be, that any property was worth what was paid for it; that the jury should consider whether there was evidence sufficient to satisfy them that the property of the Rockingham Manufacturing Company was worth more or less than was paid for it: If not, the capital paid in, being in the proportion of 35 to 100 compared with the capital agreed for, the value of the shares tendered must be taken, in the absence of all other evidence, to be in the same proportion, compared with the value they would have had if the whole capital had been paid in; that is, of the value of $175 only per share, instead of $500, and the plaintiff would be entitled to recover for the deficiency of $325 on each share, with interest from the expiration of the two years named in the agreement.

The jury returned a verdict for the plaintiff, and assessed damages in the sum of $3,453·12. Which verdict is to be affirmed, and judgment entered thereon, or for such different sum as the court shall direct; unless, upon the case reported, the defendants are entitled to have a verdict entered in their favor, or a new trial.

Goodrich, for the defendants, argued, 1st. that the defendants were not liable to an action, until after demand made on them. 1 Chit. Pl. (6th Amer. ed.) 363. *Sicklemore* v. *Thistleton*, 6 M. & S. 9.

2d. The consideration of the defendants' promise failed The promise was made in consideration of an act done, viz. a deed given by the plaintiff; but the evidence shows that this act was done subsequently, if ever, whereby the defendants' time to perform their promise was shortened, to their injury, and without their consent. Besides, the plaintiff's deed passed nothing to the corporation, as the corporation, not having accepted its charter, was not legally *in esse*. Angell & Ames

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on Corp. 46. Again, the letters patent were void, the requisite oath not having been taken by the patentees. The oath taken was that which is prescribed by *St.* 1793, *c.* 55, § 3, (1 U. S. Laws, Story's ed. 301,) to be taken by a citizen. The *St.* 1800, *c.* 25, § 1, (1 U. S. Laws, Story's ed. 752,) which extends to aliens, who have resided two years in the United States, the privileges of the patent laws, requires that they shall make oath, that to the best of their belief the invention, &c. "has not been known or used, either in this or any foreign country." This oath was not taken by the patentees, nor by either of them. The case of *Whittemore* v. *Cutter*, 1 Gallis. 433, in which it was held that a patent is valid, though the required oath is not previously taken, passed without much consideration, and seems to be virtually overruled by *Pennock* v. *Dialogue*, 2 Pet. 17. *Grant* v. *Raymond*, 6 Pet. 246. *Shaw* v. *Cooper*, 7 Pet. 319. See also *Evans* v. *Eaton*, 3 Wash. C. C. 454. *Earl* v. *Page*, 6 N. Hamp. 477.

The defendants are not estopped, by the recital in their agreement, that they had received a conveyance of the patent, right, to object that it was void. That conveyance was a quit-claim only, and it is by mistake, and not by fraud, that the patent, attempted to be conveyed, is not a legal one. *Perkins* v. *Bumford*, 3 N. Hamp. 522. *Knox* v. *Martin*, 8 N. Hamp. 155.

3d. The plaintiff, on the facts proved, is not entitled to any damages. He was entitled to a certificate of shares in a certain form, and one which is equivalent has been tendered to him. The shares, that were in fact issued, were worth as much as those which it was originally intended should be issued. By the agreement, the shares were not to exceed two hundred. This imports that they might be less. "Each share" means each of the shares then issued.

The defendants are, in effect, sureties of the manufacturing company. They undertake to *guaranty* the payment of certain notes; but a party does not guaranty payment of his own debts.

C. G. Loring and *Gardiner*, for the plaintiff. 1st. The plaintiff was not bound to make any demand before suit brought. He was to receive deeds of shares, &c., within a given time; or in

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default thereof, to receive money. The certificate which was tendered cannot avail the defendants, because the capital stock had not been paid in. The defendants knew whether the acts, which they agreed to do, had been done; and where facts are peculiarly within the knowledge of a party, he is not entitled to notice, and demand. *Hobart* v. *Hilliard*, 11 Pick. 144. *Lent* v. *Padelford*, 10 Mass. 230. The defendants were not sureties, but were the persons to do the acts stipulated.

The provision that the defendants will pay "on demand" has no legal effect. These words are mere surplusage. If they had been omitted, the agreement would have been the same in law that it now is.

2d. As to the consideration. The defendants are estopped to object, that the corporation was not *in esse* when the plaintiff's deed was given. They have recited, that it was given on the day of their agreement. But a better answer, perhaps, is, that a deed takes effect from the delivery.

The letters patent import, *primâ facie*, that all is right, and the defendants must show the contrary. No statute requires that the letters should show that the oath was taken. Nor does it appear, in the letters, that McGilroy was an alien; he may have been a naturalized citizen.

The patent laws make no express provision for a joint patent; and is one to lose the whole right, because the right oath is not administered to the other? But the oath is not essential to the validity of the patent. The condition of the grant is, that the invention is new. *Whittemore* v. *Cutter*, 1 Gallis. 433. *Cuting* v. *Myers*, 4 Wash. C. C. 220. *Shaw* v. *Cooper*, 7 Pet. 316.

A patent is not void, but voidable only, though some essential prerequisite be omitted. The consideration of the agreement was, therefore, good and sufficient. *Grant* v. *Raymond*, 6 Pet. 246. A defective patent may be surrendered, and a new and amended one taken out. *Ibid.* *Morris* v. *Huntington*, Paine, 355. *Shaw* v. *Cooper*, 7 Pet. 316.

The defect in the patent in question, if any, is on the face of it, and the plaintiff conveyed without warranty.

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3d. The damages should be $ 500 for each of the ten shares The tender, being of a different thing from that which was agreed for, was a nullity, and the plaintiff reverts to the original price of the patent, for which he was to have $ 7,500, and has received $ 2,500 on Blake's notes, leaving $ 5,000 due to him.

Shaw, C. J. One objection to the recovery of the plaintiff is, that his deed to the Rockingham Manufacturing Company bears the date of the 28th of January, 1836, and that the company was not organized until the 10th of February, 1836, though incorporated the November preceding, and in fact this agreement is made the 22d of January, 1836, before the date of the deed and the organization of the company. But we think there are several answers to this objection. A date of a deed may always be controlled by evidence of the actual delivery. Here the agreement recites the deed, and recites that it was then made and so made at their request, and this is conclusive, that the deed was then made, and the date is immaterial. But as to the other part of the objection, that the company was not then organized, we think that was the affair of the defendants, and not of the plaintiff. He made the deed at their request, and that was a good consideration for the promise.

But we have no doubt that the deed thus made to a company incorporated, would enure to their use when organized, at least by way of estoppel, and be good against the grantor, whether it took effect on its delivery, to pass any property, or not.

The second ground of exception is, that there was no demand made by the plaintiff for the shares, previously to the commencement of the action. In answer, it appears to the court, that no demand was necessary ; not upon the company, because the plaintiff had no claim upon the company ; nor upon the defendants, because the conveyance was not to be made by them. But a more satisfactory answer, perhaps, is to be found in the stipulation of the defendants, that the plaintiff should receive the ten shares in the capital stock, made up as therein expressed, and no act seems to have been contemplated to be done on his part. This stipulation was, that the plaintiff should receive ten shares of the capital stock of said company, to be made up to

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$100,000, of which the patent right should be $20,000, and that such stock, so made up, should be divided into shares not exceeding 200; so that each share should be of the par value of $500. The stipulation on the part of the defendants was, that if within two years the plaintiff did not receive a transfer of ten such shares, they would pay the difference in cash, on demand. No demand of the shares therefore was requisite; and as to the demand provided for in the agreement, it was to pay money on demand. And the *sæpe requisitus* contained in the writ, is all the demand necessary to be averred, and by a well known and familiar rule of law, no other proof of that averment is required.

The defendants further object, that there has been a failure of consideration. To support this exception, the grounds already suggested are relied upon, viz. that the deed was not made till after the agreement, and that the company was organized still later. The answer, which seems to the court conclusive, has already been given. The recital shows that the deed was then given, and the existence and delivery of this deed on request, was a good consideration.

Another exception to support this ground of want of consideration is, that the oath taken by the patentees was not taken in the form prescribed by law, one of the patentees being an alien resident. It is said that the form of the oath should be, that the patented improvement has not been known or used in this or any other country. Whether the oath be or be not sufficient in point of form, the court are of opinion that the taking of the oath in due form, is not a condition precedent to the validity of the patent. It has been so held by the learned judge of the circuit court for this circuit, and we think upon good reason. 1 Gallis. 433. The statute is directory to the officer who superintends the issuing of letters patent, but is not a condition to the validity of the patent. If in truth the invention is not new, and the use of it is not original, it will vacate the patent, whether the oath be taken or not.

Several other answers were made to this exception, but we are of opinion that the one given is decisive, and renders it unnecessary to go into the answer more at large.

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The contract being to transfer shares of a stock specially described, namely, 10–200th parts of a stock made up to $ 100,000, including the patent right estimated at $ 20,000, the court are of opinion, that the tender of 10–70ths of a stock of a very different description, was not a compliance with the defendants' contract, and therefore the plaintiff is entitled to recover.

As to the rule of damages, the court are of opinion, that the plaintiff is entitled to recover the value of the ten shares, such as they would have been worth, had the full $ 80,000 cash capital been paid in, in addition to the $ 20,000, which was the estimated value of the patent. The question for the jury is, what would have been the value of ten shares, in such a capital stock, raised for and appropriated to such a branch of manufacture, had it been made up at the time stipulated, and the company ready to proceed in good faith to operate upon such capital pursuant to their charter. It might have been worth somewhat more or less than the par value; so much as it would have been worth in money, we think the plaintiff entitled to recover.

Unless the parties agree upon the amount of damages, the case will be put to a jury on that single point.

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Thomas J. Lobdell *vs.* Eliphalet Baker.

The holder of a note, who fraudulently procures it to be indorsed by a minor, and afterwards sells it to a person who relies on the validity of such indorsement, is liable to an action by such person, though, at the time of sale, he had no fraudulent intent. Selling the note without erasing such indorsement, or disclosing the minority of the indorser, is tantamount to a direct affirmation by the seller, that the indorsement constitutes a valid contract.

Where a *broker* makes a sale in the usual line of his business, his representations bind his principal, although they are made contrary to the principal's express instructions; unless such instructions are known to the purchaser. *Aliter*, in case of particular and special agents.

In an action against one for selling a note which he had fraudulently procured to be indorsed by a minor, the plaintiff may give evidence of the declarations, made at the time of the sale, by the broker whom the defendant employed to sell the note, concerning the character of the note and the parties thereto.

Where, in the trial of such action, evidence was admitted, that the defendant was a man of sudden impulses, and that, within two or three minutes after procuring such indorsement, he expressed his regret that he had so done; an exception to the admission of such evidence was held not to be well founded.

Trespass upon the case. The declaration alleged, that in February, 1837, the defendant was possessed of a promissory note, dated the 3d day of said month, for $2,775·89, made by Hicks, Lawrence, & Co. of New York, and payable in four months, to J. J. A. Bruce of New York, or order, and indorsed in blank by the payee: That the defendant, with a design to deceive, defraud, and injure all persons who might thereafter become the purchasers of said note, and to cause them to purchase it with a belief that it was indorsed, in addition to the indorsement of said payee, by another person, whose indorsement was valid and could not be avoided, procured one Joseph Swan, Jr., a minor, in the defendant's employ, and known by the defendant to be a minor, to indorse the same in blank; and afterwards, by his agent, B. Winslow, a broker, offered to sell said note to one Stearns, who, relying on said Swan's indorsement as valid, &c. purchased the same: That the plaintiff, on the 11th of March, 1837, relying on said Swan's indorsement of said note as effectual and not capable of being avoided, and in consideration thereof, purchased said note of said Stearns: That when the note became due, the makers thereof, though demand was

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made on them, failed to pay; and that Bruce, the first indorser, though notice was duly given to him, refused to pay: That the plaintiff commenced an action against said Swan, as indorser of said note, who pleaded and proved his infancy, and obtained a verdict, and recovered judgment against the plaintiff for costs.

At the trial before *Wilde*, J., the plaintiff produced the note, proved the demand on the makers and due notice to the indorsers, and exhibited the record of the judgment in his suit against Swan. He then called Swan as a witness, who testified that he indorsed the note, and also two other notes made and indorsed by the same parties, amounting to about $ 7,000, at the defendant's request, who called him to the desk and asked him if he was afraid to indorse them, to which he replied that he was not, and thereupon put his name on them, and nothing more was said; that he was then eighteen years of age, and had been a year or two in the defendant's employment; that he had an uncle in New York, Caleb Swan, of the firm of Stone, Swan, & Mason, an old established house, which was dissolved about that time.

Upon cross-examination, the defendant's counsel were permitted (the plaintiff's counsel objecting,) to ask this witness if the defendant was not a man of sudden impulses and movements, and the witness answered that he was.

The plaintiff introduced testimony tending to show that Stearns (who purchased the three notes of Winslow, and sold one of them, through Winslow, to the plaintiff,) relied, at the time when he purchased, on the makers, and also on Swan the indorser, supposing him to be of the firm of Stone, Swan, & Mason; all which was denied by the defendant, who introduced evidence tending to impeach the witness who gave this testimony.

The plaintiff also introduced testimony to show, that when the defendant gave Winslow the notes to sell, he stated that they were New York business paper; and that when asked by Winslow if Swan was of the firm of Stone, Swan, & Mason, the defendant replied, "he is not, or, I do not know." All this also, was denied by the defendant, and the testimony in relation to it was contradictory.

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The defendant introduced testimony tending to show, that to an inquiry by Winslow, before the sale of the note, who Joseph Swan, Jr. was, the defendant replied, "that name is nothing, the notes are good enough without." A clerk of the defendant also testified, that he was present when the notes were indorsed by Swan; that the defendant called Swan to the desk and asked him if he had any objection to indorse them, who answered that he had not, and put his name thereon, and immediately went away. The defendant's counsel were permitted (the plaintiff's counsel excepting thereto,) to inquire of this witness as to the defendant's declaration immediately after Swan left the desk, and not in his hearing; and the witness stated that, two or three minutes afterwards, the defendant said he was sorry he had got Joseph to indorse the notes, but it would do no harm; and that the notes were then put away.

The defendant called P. Alden, one of his partners, and inquired of him respecting a conversation between him (Alden) and Winslow, when the defendant was not present, which inquiry the judge allowed the witness to answer, although the plaintiff's counsel objected. The witness testified, that Winslow came to the store, and, in conversation with him, said there was a name on the notes which was not on his memorandum, and asked if he was a responsible person; and that the witness replied that it did not make the notes any better, they were good enough without it. This statement was afterwards contradicted by Winslow, on his being called by the plaintiff.

There was conflicting testimony as to the credit of the makers of the note at the time of the sale thereof to the plaintiff.

The plaintiff offered to give in evidence the declaration of Winslow concerning the character of the notes, and the parties thereto, at the time of the sale thereof to Stearns and to the plaintiff, but the defendant objected, and the judge refused to receive it.

The jury were instructed, that if the defendant authorized Winslow to sell the notes on the credit of the names of the makers and the first indorser only, the defendant was not

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chargeable, although Winslow did sell, and the plaintiff did buy, on the credit of those names and on that of Swan's also.

The plaintiff insisted that the procuring of Swan's indorsement, and the putting of the note into the hands of a broker for negotiation, rendered the defendant liable to any third person who might take the note, if he were ignorant of the fact of Swan's infancy, and placed any reliance on him as indorser, although the defendant, when he put the note into the broker's hands, told him that Swan's name was of no value. But the judge instructed the jury, for the purposes of the trial, and to ascertain a material point in the defence, that if they should be of opinion, from the evidence, that Swan's indorsement was procured with a fraudulent intent, it would not be such a fraud as would make the defendant liable in this action, if, upon the whole evidence, they should find that the defendant had no fraudulent intention when he put the note into circulation.

The jury, after having been out for some time, came into court with a written request for instructions, in these words: "Would the plaintiff be entitled to a verdict, if the fraudulent act was proved to the satisfaction of the jury, provided that there was a doubt in the minds of the jury whether or not that Lobdell was apprized that the name of Swan was not valuable?" Upon which the judge instructed the jury, that the burden of proof was on the plaintiff to show that he was deceived by the fraudulent conduct of the defendant, and that he gave credit to the name of Swan; and that if they doubted on that point, their verdict should be for the defendant. A verdict was returned for the defendant.

New trial to be granted, if the judge erred in the admission or rejection of evidence, or in his instructions to the jury.

Bartlett, for the plaintiff. The evidence that the defendant was subject to sudden impulses was inadmissible. It respected his moral character only; not his legal liability. Such evidence can be received only in criminal cases. 2 Stark. Ev. 366. *Potter* v. *Webb*, 6 Greenl. 14. *Humphrey* v. *Humphrey*, 7 Connect. 116. *Howe* v. *Perry*, 15 Pick. 506.

The defendant's declarations, after Swan had indorsed the

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notes and left the desk, that he was sorry, &c. should not have been received in evidence, not being part of the *res gesta*, and neither explaining nor elucidating the character of the transaction; but being merely an expression of regret for a past transaction; words in his own favor. *Allen* v. *Duncan*, 11 Pick. 308. *Enos* v. *Tuttle*, 3 Connect. 250. *Carter* v. *Gregory*, 8 Pick. 165.

Alden's testimony, as to his conversation with Winslow, only tended to show that Winslow learned from a third person, that Swan's name was of no value. The defendant cannot give in evidence the declarations of his own agent to his own partner, as to his communications to that agent. He should have called Winslow as a witness. The fact, that Alden told Winslow that Swan's name was of no value, was not legal evidence. The plaintiff could not have shown that another partner of the defendant told Winslow that Swan's name was good.

The instruction to the jury, that the defendant was not liable if he authorized Winslow to sell the note on the credit of the makers and first indorser only, although he did sell on the credit of Swan also, cannot be supported. Winslow was a general broker, and the defendant therefore liable for his acts, whether authorized or unauthorized. Story on Agency, 121. 465. *Pickering* v. *Busk*, 15 East, 38. Long on Sales, (1st Amer. ed.) 233.

That the form of action adopted in this case warrants a recovery against the defendant, is shown by *Williamson* v. *Allison*, 2 East, 449, and *Gresham* v. *Postan*, 2 Car. & P. 540. If so, then Winslow's declarations should have been received in evidence for the plaintiff. Story on Agency, 126.

The instruction was erroneous, that the defendant was not liable, though he fraudulently procured Swan's indorsement, if he intended no fraud when he put the note into circulation. The defendant was estopped to deny an intent to defraud by circulating what he fraudulently concocted. The intent is, by law, presumed to continue, so far as civil consequences are in question. *The King* v. *Dixon*, 3 M. & S. 15. *Rex* v. *Sheppard*, Russ & Ry. 169. *Haire* v. *Wilson*, 9 Barn. & Cres. 643.

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But the intent of the defendant is not material. The case of *Tryon* v. *Whitmarsh*, (*ante*, 1,) is not applicable to this. Fraudulent intent is not necessary to charge a defendant, where the plaintiff transfers his property to the defendant on the faith of his representations, express or implied. *Adamson* v. *Jarvis*, 12 Moore, 241. *S. C.* 4 Bing. 66. *Humphrys* v. *Pratt*, 2 Dow & Clark, 288. *Polhill* v. *Walter*, 3 Barn. & Adolph. 114. *Freeman* v. *Baker*, 5 Barn. & Adolph. 797.

Choate, for the defendant. The only important question in the case is, whether it be necessary that the defendant should have had a fraudulent intent when he put the note into circulation. As this declaration is framed, the instruction of the judge was correct. Fraud is the gist, the entire gravamen, of the declaration, and proof of mere negligence will not support it. All the cited cases, in which evidence of innocent intent was not permitted to be proved, are those, (it is submitted,) in which an immoral or an illegal act was done, and an injury committed. Such also was the case of *Adams* v. *Paige*, 7 Pick. 549.

If this be so, then the plaintiff's objections to the evidence which was admitted, cannot prevail. The evidence, that the defendant was a man of sudden impulses, tended to prove that no immoral act was done. 1 Stark. Ev. 30. So of the defendant's saying he was sorry that he had procured Swan to indorse. That was also part of the *res gesta*. No right of third persons had intervened before the repentance. *Tompkins* v. *Saltmarsh*, 14 S. & R. 275.

The defendant is said to be liable for Winslow's acts, because he was a general broker. Is the defendant liable for a *fraud*, (as he is charged,) because his agent forgot to state that Swan was a minor, or that his indorsement was of no value? He is not thus liable on this declaration, if he could be made so on any.

The objection to Alden's testimony, on the ground that Winslow should have been called by the defendant, is answered by the general rule, that any *act done* in the course of a negotiation, may be proved by any witness. This testimony was circumstantial as to the intent; and it was admissible in contradiction of Winslow, though admitted before he testified. The only

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question is, whether its being admitted too soon shall set aside the verdict.

WILDE, J. (After stating the facts.) Upon these facts, the case was submitted to the jury, who returned a verdict in favor of the defendant; whereupon the plaintiff's counsel excepted to the rulings of the court in the admission and rejecting of the evidence objected to, and to the instructions to the jury.

It was argued for the plaintiff, on the evidence, that the defendant procured the indorsement of Swan for the fraudulent purpose of giving a false credit to the note, and thereby to deceive and injure all such persons as might afterwards purchase the said note, believing the said indorsement to be valid and not voidable.

The defendant's counsel insisted, that there was no sufficient evidence of any fraudulent intent of the defendant in procuring Swan's indorsement; that it was inadvertently done, and the intention of selling the note with Swan's indorsement was immediately abandoned, and when he put the note into the broker's hands, the broker was informed that Swan's name was of no value. It was also contended, that if the jury should find that Swan's indorsement was procured fraudulently, as charged in the declaration, yet the defendant was not liable unless the note was sold and put in circulation with a fraudulent intent. And on this point of defence, the defendant's counsel principally relied. In order, therefore, to ascertain whether the note was sold and put in circulation with a fraudulent intent, the jury were instructed, that, if Swan's indorsement was procured with a fraudulent intent, it would not be such a fraud as would render the defendant liable in this action, if, on the whole evidence, they should find that the defendant had no fraudulent intention when he put the note in circulation.

If this instruction be incorrect, the plaintiff is entitled to a new trial; for although the jury may have found for the defendant on another ground of defence, namely, that no credit was given to Swan's indorsement, yet this is uncertain, as some of the jurors might have agreed to the verdict on one ground, and some on another; so that the verdict must be set aside if there

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was any material misdirection in the defendant's favor, as to either of the grounds of defence.

The principal question is, whether it was necessary to be shown that the note sued was put in circulation with a fraudulent intent. The argument for the defendant is, that fraud is the gist of the action; not carelessness or negligence: That the fraudulent intention, if any there was, with which the indorsement of Swan was procured, was immaterial, unless it continued up to the time when the note was sold; and that the only material question is, whether the sale was fraudulent.

On looking into the abstract of the declaration, we find that it is not averred, that the defendant sold the note with any fraudulent intention. It alleges that the indorsement of Swan was procured by the defendant with such an intention; and that he offered to sell it to Stearns, who, relying on the indorsement of Swan as effectual, purchased the note of the defendant, and paid him therefor. If, therefore, the argument of the defendant's counsel be well founded, and it is necessary to prove that the sale was made with a fraudulent intent, the defendant might prevail on a motion in arrest of judgment. But if a new trial should be granted, this defect, if it be one, might be supplied by an amendment. This question, therefore, is to be decided without any regard, in this particular, as to the form of the declaration.

Several cases were cited on this point, which we think decisive. In *Adamson* v. *Jarvis*, 12 Moore, 241, it was averred in the declaration, that the defendant, having property of great value in his possession, represented to the plaintiff that he had authority to dispose of it, and the plaintiff thereupon purchased it; but it was not averred that the defendant knew he had no authority to make the sale. And after a verdict for the plaintiff, it was held that a *scienter* was not necessary; and the case was distinguished from that class of cases where a party, who has no interest in a matter about which his opinion is applied for, gives an honest though mistaken one, is not responsible. There is no question as to the *scienter* in the present case; but the decision, in the case cited, shows that a party may render himself

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liable in an action for damages to a party prejudiced by a false affirmation, though not made with any fraudulent intention.

Several other cases were cited, by the plaintiff's counsel, to establish a very familiar principle of law, in respect to which there can be no controversy. The principle is, that where a party affirms either that which he knows to be false, or does not know to be true, to another's loss and his own gain, he is responsible in damages for the injury occasioned by such falsehood. This is a very just and reasonable principle, and is well established. The only doubt, if there be any, is, whether it is applicable to the question now to be decided. There was no evidence that the defendant made any express declaration that the note sold was a valid note, and that the makers and indorsers were liable; but we are all of opinion, that if he fraudulently procured the indorsement of Swan, and then authorized Winslow to sell the note without erasing the name of Swan, knowing, as he did, that Swan was a minor, and not by law liable on the note, all this would be equivalent to an express affirmation that the note was a valid contract, on which the makers of the note and the indorsers were by law liable. A party is to be presumed to have intended the consequences of his own acts. And if the defendant had repented the procuring of Swan's indorsement, to render his repentance effectual he should have erased the indorsement before he put the note in circulation, so that no one might be deceived and defrauded thereby.

For these reasons, we are of opinion that the plaintiff is entitled to a new trial. The same reasons have a bearing also or another question, which may be of importance on a new trial.

The plaintiff offered to give evidence of the declarations and representations of Winslow, made to Stearns and the plaintiff, at the time of the sale of the note, as to the parties to the same. This evidence we think is relevant to the issue, and ought to have been admitted. It was rejected, on the ground that the defendant was not responsible for any misrepresentation made by his agent, without authority, and contrary to the defendant's express instructions. This is undoubtedly the law as to all particular and special agents; for it is the duty of the person deal-

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ing with such an agent, to ascertain the extent of his authority. And if the agent exceeds the limited authority conferred on him, the principal is not bound by his misrepresentations, or any other unauthorized acts, unless the acts so done are within the scope of his authority, in the performance of the act he was authorized by the principal to perform; or unless the principal had held him out as his general agent; or as one having a more enlarged authority. Story on Agency, 122. But this rule of law is not applicable to the present case; for the authority of a general agent cannot be limited by any private instructions, unless they were known to the person dealing with him; and this rule extends to factors and brokers, acting in the line of their employment. And it makes no difference, as Judge Story remarks, whether the factor or broker had been ordinarily employed by the principal, or it is the first instance when he was so employed. This distinction between general and special agents is discussed by Judge Story, with his usual fulness and ability, in his Commentaries on the Law of Agency; and he approves the rule laid down by Smith, in his work on Mercantile Law, *p.* 59. "A general agent," he says, "is a person whom a man puts in his place, to transact all his business of a particular kind; thus, a man usually retains a factor to buy and sell goods, and a broker to negotiate all contracts, of a certain description; and so in other instances. The authority of such an agent to perform all things usual in the line of business in which he is employed, cannot be limited by any private order or direction not known to the party dealing with him. But the rule is directly the reverse concerning a particular agent, that is, an agent employed specially in one single transaction; for it is the duty of the party dealing with such a one, to ascertain the extent of his authority; and if he do not, he must abide the consequences." Story on Agency, 116, *note*. This seems to be a reasonable rule, which is founded on public policy, and is well supported by the authorities. In the case of *Pickering* v. *Busk*, 15 East, 43, Lord *Ellenborough* says, he could "not subscribe to the doctrine, that a broker's engagements are necessarily, and in all cases, limited to his actual authority; for it is clear, that he may bind his prin-

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cipal within the limits of the authority with which he has been apparently clothed by the principal, in respect to the subject matter; and there would be no safety in mercantile transactions, if he could not." So *Bayley*, J. remarks, that "if the servant of a horse dealer, with express directions not to warrant, do warrant, the master is bound; because the servant, having a general authority to sell, is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed." This doctrine is conformable to the well established principle, that when one of two innocent persons must suffer by the fraud or negligence of a third, he is to bear the loss who enabled the third person to do the injury, by giving him credit, and holding him out to the world as his agent. *A fortiori*, if an innocent person sustains a loss, occasioned by the fraud or misconduct of another person, the latter will be held responsible, although he can show that the loss would not have been incurred, but for the misconduct of a third person, especially if that person is his agent.

There is also another satisfactory reason for admitting evidence of the representations made by Winslow, at the time of the sale of the note; because the evidence might have an important bearing on the question, whether the plaintiff or Stearns purchased the note, with any reliance on, or giving credit to, the indorsment of Swan. A question upon which, as it seems, the jury entertained some doubts.

As to the admission of the evidence in favor of the defendant, to which the plaintiff excepted, we are of opinion that the exception is not well founded. But the evidence will be of no importance, on the new trial, in consequence of the decision of the court, on the principal question raised by the exception to the instructions to the jury. For if the defendant fraudulently procured the indorsement of Swan, he cannot, in our judgment, exculpate himself, by proving that he repented of his intended fraud; for it was his duty to erase the name of Swan, so that no person could possibly be defrauded by his indorsement. This evidence undoubtedly affects favorably the defendant's character; but has no effect on his legal liability, if the indorsement

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of Swan were procured by him with the fraudulent intention of putting the note in circulation, and giving to it a false credit. If Winslow was directed not to sell the note on the credit of Swan's indorsement, still if he did represent it as a valid indorsement, the rule in this action applies, *respondeat superior*. This rule is founded on a just and salutary principle of public policy, however hard its operation may be on the defendant, if he did not intend to sell the note on the credit of Swan's indorsement, and it was so sold by Winslow, contrary to the defendant's directions.

New trial granted.

CHARLES G. LORING, Administrator, *vs.* JOHAN F. STEINEMAN and others.

A decree of distribution, made by a probate court, after such notice as is prescribed by statute, or, if no statute require notice, after such notice as the court, in its discretion, shall think proper to order, is so far conclusive as to protect an administrator, acting in good faith, in conforming to it.

A decree of distribution is not to be made in the general terms, used in the Rev. Sts. *c.* 60, to designate the heirs at law of an intestate, *viz.* "his brothers and sisters, and the children of any deceased brother or sister," &c.; but the probate court is to ascertain who are the existing individuals entitled to distribution, and to decree distribution to them by name.

When a person leaves his usual home and place of residence, for temporary purposes, and is not heard of, or known to be living, for the term of seven years, the legal presumption is that he is dead.

THIS was an appeal, by the administrator of the estate of John B. Steineman, from a decree of distribution made by the judge of probate for this county.

The parties submitted the case to the decision of the court upon the following facts: John B. Steineman, a native of Germany, who had resided in this Commonwealth several years, died intestate, in 1835, at the asylum for the insane, in Charlestown. At his decease, his property was in the hands of Samuel Hubbard, Esq. who had previously been appointed his guardian. On the 25th of July, 1836, the appellant was, at the request of said guardian, and of a relative and representative

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of the deceased, appointed administrator of said deceased's estate, and accepted said trust. It was understood, at the time, between said administrator and the parties at whose request he took upon himself said trust, that he might, if he should deem it needful, require a judgment of some competent tribunal, compelling him to distribute the estate, before making any distribution thereof.

On the 13th of May, 1839, said administrator presented his first account of his administration, which, after the usual notices and publications, was allowed; and which showed a balance in his hands of $ 12,844·01, for distribution. He thereupon presented a petition to the judge of probate, setting forth, according to his best information and belief, that Johan F. Steineman, a brother of said intestate, and three sons (naming them) of Johan H. Steineman, deceased, another brother of said intestate, and Bernhard Lucas Steineman, likewise a brother of said intestate, *if he were living*, were, by the laws of the duchy of Oldenburg, of which the intestate was a native, and by the laws of this Commonwealth, his heirs, entitled to the property in said administrator's hands. Said administrator further represented to the said judge, that he had been informed, and believed, that said Bernhard Lucas Steineman was dead, leaving no issue; and that, if he were so dead, the other parties before named would be entitled to the share of said estate, which the said Bernhard L. would have had, if living; but that said administrator, having no satisfactory legal evidence of the death of said Bernhard, was unwilling to pay over such share, without the authority of a judgment or decree of court, according to the understanding (above mentioned) upon which he took administration on said estate. Wherefore the said administrator prayed that distribution might be decreed to the heirs at law of said deceased, agreeably to law.

The judge of probate ordered no notice to be given upon said petition, nor concerning said intended distribution, and at the hearing of said administrator, thereupon decreed, that the sum in his hands should be distributed and paid over, one half to Johan F. Steineman, a brother of the intestate, and the other half to

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the three sons (naming them) of his deceased brother, Johan H. Steineman.

From this decree, said administrator appealed, and filed the following reasons therefor. 1. That said decree, if conformed to by said administrator, would not protect him against the claim of Bernhard Lucas Steineman, a brother of said intestate, to a share of said estate, if living, nor against the claim of his heirs at law, if he deceased married or leaving issue, nor against the claim of his legal representatives. 2. That there is no sufficient evidence, that the persons to and among whom the said estate is, by said decree, ordered to be distributed, are the only heirs at law of said deceased. 3. That said decree is contrary to the laws of the land, and ought, for other good and sufficient reasons, to be revoked and annulled.

It was agreed by the parties, that the intestate was insane about three years, and that some of his said heirs were, either before or after his decease, apprized of this fact; and that neither the said Bernhard Lucas Steineman, or any issue of his, ever appeared, to make claim on Mr. Hubbard, the guardian, for any part of his estate; and that said guardian had no knowledge of the existence of said Bernhard, or of any issue of his, other than that obtained by the depositions hereafter mentioned.

After this appeal was entered in this court, the appellees obtained depositions from their native place and that of the intestate, in the duchy of Oldenburg, satisfactorily proving that they are the heirs at law of said intestate.

It also appeared from said depositions, that said Bernhard Lucas Steineman left the residence of his mother, unmarried, about thirty-seven years ago, to engage as a sailor in a vessel; that within two or three years afterwards, he engaged as mate of a vessel at Lisbon, and had never since been heard of at his native place or place of last residence. The deponents, on these grounds, expressed their belief that he had long been dead without issue.

The case was argued in writing; and the grounds of argument fully appear in the opinion of the court. It was understood, that the case was brought into this court merely for the purpose

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of obtaining a final decree, which should effectually protect the appellant.

Dehon, for the appellant.

S. Hubbard and *Atwood*, for the appellees.

SHAW, C. J. This is an appeal from a decree of the probate court of this county, directing a distribution of the estate of John B. Steineman, a German, who had resided many years in this country, and died intestate, in 1835, leaving a considerable amount of property. He left no wife nor issue, but left collateral relations living in the duchy of Oldenburg. The probate court decreed a distribution of the estate, to one brother of the deceased, one half; and to the three children of a deceased brother, as representatives of their father, one sixth each. No distributive share was assigned to Bernhard Lucas Steineman, a brother, who was proved once to have been living, but of whose decease no positive evidence was given.

Whether, under the actual circumstances of the present case, the decree of distribution, made in the court below, would have been conclusive against the claims of any other person, or would have protected the administrator, may admit of great doubt. These circumstances were, that the decree was made upon the motion and representation of the administrator himself, without the application of any party in interest; that no notice was given, and that no proof of the facts of the existence or death of the collateral relations of the deceased intestate, was laid before the probate court. It rather appears to have been a decree *pro forma*, taken for the purpose of bringing the case before this court by appeal.

We can entertain no doubt, that the judgment of a probate court, duly made, after such notice as the statutes require, or if they require no notice, then after such notice as the court, in its discretion, acting upon the circumstances of the case, may think proper to order, must be deemed in its nature so far conclusive, as to protect an administrator, acting in good faith, in conforming to it. The distribution of an intestate estate is within the peculiar and exclusive jurisdiction of the probate court, exercising, in this respect, the jurisdiction of the ecclesiastical courts. The

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administrator is compellable to submit to it. It is a part of the obligation of the bond, which he is by law bound to give, on taking administration, to distribute the residue of the estate as the court of probate shall order. A refusal to pay a distributive share, on demand, is *ipso facto* a breach of the bond, and a distributee, after demand of payment and refusal, may forthwith bring an action on the probate bond, for his own benefit, without any permission or authority of the judge. In such action on the bond, a decree of distribution, not appealed from, is conclusive of the right of the distributee, and its validity cannot be drawn in question by any pleading or proof.

The authorities, as to the conclusive effect of a judgment of a court of competent jurisdiction upon the subject matter to which it extends, and upon all parties and privies, are so numerous, that the only difficulty is in the selection. 2 Evans's Pothier (Philad. ed.) 301, *et seq.* *Homer* v. *Fish*, 1 Pick. 435 *Smith* v. *Lewis*, 3 Johns. 157. *Philips* v. *Hunter*, 2 H. B 414. *Baxter* v. *New England Marine Ins. Co.* 6 Mass. 277

But it is said, that in order to give a binding effect to a judicial decision, the court must have jurisdiction of the subject matter and of the parties. The latter part of this proposition applies more especially to a contest between party and party, as to real or personal rights. But in many cases, courts of peculiar jurisdiction have jurisdiction of the subject matter absolutely, and persons are concerned incidentally only, according to their respective rights and interests ; as in a question of prize, the jurisdiction of the court of admiralty extends to the question whether prize or not, and, by adjudicating upon that question, settles it definitively, in regard to all persons interested in that question, whether they have notice or not.

And we think the distribution of an intestate estate is analogous. The subject matter, the property, is within the jurisdiction of the court, and the judgment, by determining who are entitled to distributive shares, and extending to the entire estate, determines that no other persons are entitled, and is necessarily conclusive, because nothing further remains to be distributed. The persons interested, especially when foreigners, cannot be

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brought before the court, unless they choose to present themselves, and make their claims, upon such actual or constructive notice as the law requires.

But it is said, that the law gives no express direction, that any particular notice shall be given; and we believe this is true. The reason probably is, that in the great majority, indeed in nearly all the cases of persons dying intestate, in this Commonwealth, the heirs and distributees will be the children, parents, brothers, and sisters, or other near connexions, who will be in a condition to have actual notice of all the steps taken in the settlement of the estate. In the few extraordinary instances of foreigners dying here, being so diverse in their nature and circumstances, it is competent for the probate court to give such notice as will be most likely to reach the parties in interest. This court, sitting as a court of probate, in case of an English subject dying here, has ordered notice to be published in some gazette in London. But whatever the notice is, it is such as the law deems adequate constructive notice, to warrant the court of probate in decreeing an actual and final distribution of the estate.

It was, however, urged, in the argument, that the law is imperative, directing how the estate shall be divided, and that any other distribution would be erroneous. The statute is in the alternative; the estate is to go successively to children, if any, or to father or mother, brothers, and sisters, and children of deceased brothers, and sisters, &c. The decree of distribution, therefore, involves the necessity of inquiry into questions of fact, namely, whether there be any children, and if not, any father, &c., and, if proved to have been once living, whether they were living at the time of the intestate's decease. It is true, that the statute directs explicitly who shall be entitled to the estate; but it necessarily directs this in general terms, and then it is necessary for the court to inquire, and by its decree determine, according to the state of facts, what persons in particular are so entitled in the particular case; and in deciding these questions of fact, the probate court must be governed by those rules of evidence, and those presumptions of fact from circumstances, which are resorted to by all other tribunals in determining ques

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tions of fact. The court may be deceived by perjury, misled by specious circumstances, and from various causes come to wrong conclusions. But this may happen in any other mode, in which the truth of facts may be determined. But the possibility of falling into mistake cannot deter the court from acting, and, when all the means of ascertaining the truth are exhausted, cannot prevent the judgment from being at least so far conclusive as to protect all those who are compelled to act under it and to abide by its final adjudication.

It was suggested, that a share might be reserved for Bernhard Lucas Steineman, or his lawful heirs, if he left any, in general terms, or in a hypothetical form. But if so, how long should it be reserved? When and how should a definitive decree be made? The very purpose of a court is to take the law, which must, from its nature, be expressed in general terms, and apply it to particular persons and things. The law says a surviving brother shall inherit; the court decides whether Bernhard Lucas was a surviving brother. So the law says, if he is dead, leaving children, they shall inherit. It would be inconsistent with the first principles of judicial proceedings for the court to direct the administrator to pay to Bernhard Lucas, if living, or to such children, if there be any, leaving him to determine the question of fact. The court must determine, as a fact, from the best means in its power, whether there was such a brother surviving, or whether there be any such children, and, if so, decree them a share personally and by name, and determine the amount due to each. And as the court must make an entire distribution, it is equally bound to decide the negative; and if it finds, upon this proof, that there was no such brother surviving, and no lawful issue of such brother, then those who do survive are entitled to the whole.

The fact must govern; whether that fact be proved by positive or circumstantial evidence, by strong or slight inferences, still, when lawfully proved in any mode, the fact must govern the adjudication.

It was suggested in the argument, that a proper course would be, to withhold the share of Bernhard Lucas, until the administrator should be compelled to pay over, by a judgment in a suit

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to be brought against him by the appellees. But we know of no mode in which any such suit can be brought and judgment obtained. There could be no suit on the bond till after a refusal to pay a distributive share on demand; and there could be no demand without a decree of distribution in the probate court No direct suit can be brought by an heir for a distributive share, because it can only be known by the settlement of the account of the administrator, and a decree thereon in the probate court, that the assets may not be required for the payment of debts, or that there will be any residue to be distributed. The proper, if not the exclusive remedy of an heir claiming a distributive share, is to cite the administrator to settle his account, and, if there be a surplus appearing on such account, to apply to the probate court to make a decree of distribution according to law.

The only remaining question is a question of fact upon the evidence. It is a well settled rule of law, that upon a person's leaving his usual home and place of residence for temporary purposes of business or pleasure, and not being heard of, or known to be living, for the term of seven years, the presumption of life then ceases, and that of his death arises. 2 Stark. Ev. 457. *Doe* v. *Jesson*, 6 East, 85. But this presumption may be rebutted by counter evidence, *Hopewell* v. *De Pinna*, 2 Campb. 113, or by a conflicting presumption. *The King* v *Twyning*, 2 Barn. & Ald. 386.

This presumption is greatly strengthened, when the departure of an individual was from his native place, the seat of his ancestors, and the home of his brothers and sisters, and family connexions; and still further, when it was to enter upon the perilous employment of a seafaring life and when he has not been heard of, by those who would be most likely to know of him, for upwards of thirty years. All these circumstances concur in the present case, and the court are all of opinion, that they go fully to establish the fact of the death of Bernhard Lucas Steineman.

There is no presumption that he married, or, if that were proved, that he left issue. It is a fact to be proved, if relied on to defeat the appellees' claims, and the burden of proof of the affirmative lies on the party who avers it.

Decree of the probate court affirmed

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Thomas Coffin *vs.* Peter Ray.

An attachment of real estate is valid, as against all persons except subsequent purchasers and attaching creditors, although no notice thereof be deposited in the office of the clerk of the court.

Though a second grantee have notice of a prior unregistered deed of the land conveyed to him, yet his creditors are not affected by his knowledge thereof; and if they without knowledge of such deed attach the land, and levy thereon, they will hold it against the first grantee; although they may have such knowledge before levy of execution.

Writ of entry. From the report of the chief justice, before whom the case was tried, at Nantucket, it appears that the demandant claimed title to the demanded premises in his own right, in virtue of an execution in his favor, levied thereon as the estate of Isaiah C. Ray, and that both parties claimed title under Isaiah Ray, father of said Isaiah C. Ray, and brother of Peter Ray, the tenant. The demandant gave in evidence a deed from Isaiah Ray, the father, to Isaiah C. Ray the son, dated September 3d, 1836, and recorded September 21st. The tenant gave in evidence a deed from Isaiah Ray to himself and his wife, of the same premises, to hold for their lives and the life of the survivor, dated May 23d, 1825. This deed was not recorded until June, 1837. The demandant made his attachment on the premises as the property of Isaiah C. Ray, the son, on the 28th of December, 1836; but no notice of the attachment was deposited in the clerk's office, according to Rev. Sts. c. 90, § 28. The action was entered at the court of common pleas at Nantucket, June term, 1837. Execution issued June 8th, and the premises were seized on the 9th of June. There was strong evidence, perhaps conclusive, to show that Isaiah C. Ray had actual notice of the prior unregistered deed to his uncle Peter Ray and wife, when he took the deed of his father.

It was contended by the tenant, that with such actual notice, he took no valid title, as against the persons claiming under such prior unregistered deed, and that the demandant could obtain no valid title, by attachment, larger or better than the debtor had.

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But it was ruled, that unless the attaching creditor himself had such actual notice, he was not bound by such notice to his debtor. The tenant then contended, that inasmuch as the plaintiff had not caused notice of his attachment to be given at the clerk's office, conformably to the statute, his attachment did not operate as a lien on the premises, as against the defendant's prior unregistered deed, until the seizure of the land on execution, and that if the demandant, as such attaching creditor, had actual notice of the tenant's prior deed, before taking the estate on his execution, such notice of the prior unregistered deed would be good as against the demandant; and the tenant offered evidence to prove that the demandant had such notice before the levy of his execution.

But it was ruled, by a comparison of Rev. Sts. *c.* 90, § 23, with §§ 28 – 30, that an attachment on mesne process, without notice at the clerk's office, would create a valid lien, except as against a subsequent attaching creditor, or against a person who should afterwards purchase the estate, for a valuable consideration, and in good faith; that the tenant was not within the exception, and that it would not constitute a good defence to prove, that after the demandant's attachment on mesne process, and before the levy of his execution, he had notice of the tenant's prior unregistered deed. The question whether the demandant had notice of such deed, at the time of the attachment on mesne process, was left to the jury, with directions, if he had, to find a verdict for the tenant, otherwise for the demandant.

The jury found a verdict for the demandant. If the above directions were wrong in point of law, the verdict to be set aside, and a new trial granted.

Clifford, for the demandant.

Coffin, for the tenant.

Shaw, C. J. The only question left to the jury was, whether Coffin, the demandant, had notice of the prior unregistered deed of Isaiah Ray to the tenant and his wife, at the time of his attachment on mesne process, in December, 1836; and the jury found that he had not. The facts then to be considered are,

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that Isaiah Ray, from whom both parties claim, being seized in fee, conveyed to his brother and wife, for their lives, which deed was not recorded till after the demandant's attachment. Isaiah Ray, the father, then conveyed to Isaiah C. Ray, the son, in fee, making no reservation, and not mentioning the former deed; but Isaiah C. Ray knew of the prior unregistered deed. The demandant, a creditor, attached the estate thus appearing by the record to belong to his debtor in fee, without notice of the prior unregistered deed; but no notice of his attachment was given at the clerk's office, pursuant to Rev. Sts. c. 90, § 28. He afterwards levied his execution on the same land, having notice, at the time of his levy, of such prior deed. The question was, whether he could hold the land.

In the first place, we may lay out of the case the last mentioned circumstance, to wit, that notice of the attachment was not given at the clerk's office, pursuant to the statute. The sole object of this provision is to give notice to after purchasers and attaching creditors. The provision is, that no attachment on mesne process shall be valid against any subsequent attaching creditor, or against any person who shall afterwards purchase the same for a valuable consideration, and in good faith, unless, &c. The validity of the attachment is not affected by this provision, except as against after purchasers and attaching creditors. As the tenant claims under a previous deed, he is not within the exception; and the validity of the demandant's attachment is not affected by this provision.

The general question then recurs, whether the knowledge of Isaiah C. Ray could affect the rights of his creditor, who attached without notice of the first conveyance; and the court are of opinion, that it could not. The attachment of real estate is considered as in the nature of a purchase, and the attaching creditor affected with notice of a prior conveyance, in the same manner as a purchaser. *Priest* v. *Rice*, 1 Pick. 164. But the exception in the statute, in regard to unrecorded conveyances, Rev. Sts. c. 59, § 28, of persons having actual notice thereof, is strictly personal; and although a second grantee could take such estate, as against the prior grantee, because he had actual

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notice of the prior deed, yet if through him a title passes to a third person, who has no such notice, the latter will not be affected by it. *Somes* v. *Brewer*, 2 Pick. 184. Had the plaintiff taken by deed of Isaiah C. Ray, without notice of the prior conveyance to Peter, it seems very clear, upon these principles, that he would hold the estate.

The attachment of real estate being deemed to stand in the nature of a purchase, and the attaching creditor being affected by actual notice, as a purchaser, the question is, at what time the purchase shall be deemed to be made. We think this is answered by the Rev. Sts. c. 90, § 23, which provide, that "all real estates that are liable to be taken in execution, may be attached upon the original writ, and held as security to satisfy such judgment as the plaintiff may recover." If then judgment is recovered and execution levied, the whole title acquired by the attachment and levy must be considered as taking effect at the time of the attachment. The subsequent proceedings relate back to that time. The attachment creates a lien or charge upon the land, which constitutes a complete title, if perfected by a subsequent judgment recovered in the same suit, and a seasonable levy of the execution issued on it. The court are therefore of opinion, that the point of time, before which notice of a prior unrecorded deed would affect the attaching creditor, is the attachment, and not the time of the levy; and as the demandant had no notice of the tenant's prior deed, at the time of his attachment, he is entitled to hold the land.

Judgment on the verdict for the demandant.

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Samuel Whitwell & others *vs.* Calvin Willard.

The court is not authorized by Rev. Sts. *c.* 96, § 25, to appoint an auditor, without the consent of both parties, "to examine vouchers, state accounts," &c. in an action against an officer for not attaching or levying upon certain enumerated articles of personal property, although the articles are small and very numerous, and the examination of the evidence concerning them before a jury, must necessarily require much time.

An "account," within the meaning of Rev. Sts. *c.* 96, § 25, relates to some matter of debt and credit, or to demands in the nature of debt and credit, between parties, and implies that one is responsible to another on the score of contract or of some fiduciary relation. And the term "voucher," designates an account book in which charges and acquittances are entered, or some acquittance or receipt discharging a person, or being evidence of payment.

Shaw, C. J. In this action, issue having been joined, a motion has been made, on the part of the defendant, that an auditor may be appointed, pursuant to the statute, to hear the parties, examine their vouchers and evidence, and make report thereof to the court, preparatory to a trial. This is opposed on the part of the plaintiffs, and the question is, whether it is a case within the statute, where the court may make such an appointment without the consent of both parties. We have looked into the declaration, and considering the probable course which the cause must take at the trial, the court are all of opinion, that it would be highly useful to refer the case to an auditor, and that a report, made upon a careful and deliberate examination of the evidence by an auditor, having the confidence of the parties, would much facilitate the trial. And if a reference were thus agreed to, the report would unquestionably be competent evidence, whether within the statute or not; because, in a civil action, parties may very properly waive all exceptions to any species of evidence. But not being assented to, it becomes necessary to decide, whether this case is within the provision of the statute authorizing the court to make such appointment, at the motion of one of the parties.

The provision of the Rev. Sts. *c.* 96, § 25, is, that whenever a cause is at issue, and it shall appear that the trial will require an investigation of accounts, or an examination of vouch-

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ers by the jury, the court may appoint one or more auditors to hear the parties, and examine their vouchers and evidence, and state the accounts, and make report thereof to the court.

Is this action within this provision? It is an action of trespass on the case, against the defendant as sheriff of the county of Worcester, for the alleged non-feasance of A. Matthews, one of the deputies of the defendant. The plaintiffs allege, that they had a large demand of upwards of $ 22,000, against one Brigham, that they sued out a writ, and put it into the hands of Matthews, with directions, amongst other things, to attach all the property of said Brigham, consisting of furniture and supplies in a hotel called the Worcester House. They allege the recovery of judgment and execution, the delivery of the execution to Matthews, who sold the property, and realized four or five thousand dollars only, leaving a large deficit unsatisfied. They set forth their claim in several counts.

1. That Matthews so negligently kept and consumed the property attached, that it was greatly diminished in value.

2. That he negligently kept the property attached, that he neglected and refused to levy upon all the property attached, and that he negligently and improperly conducted the sale on the execution, by which, &c.

3. That he was directed to attach all the property of said Brigham, in that house, but that there was a large amount of wines, liquors, stores, furniture, and personal property in said house, the property of Brigham, which Matthews neglected and refused to attach, which property is specificially enumerated in the count.

Considering the nature of this action, and the subjects which will be drawn in question in the trial, and the nature of the evidence, the court are of opinion, that it is not a case contemplated in this statute. It is not a case which can require an investigation of accounts, an examination of vouchers, or an account to be stated between the parties.

The primary idea of account, *computatio*, whether we look to the proceedings of courts of law or equity, is some matter of debt and credit, or demands in the nature of debt and credit, be-

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tween parties. It implies, that one is responsible to another for moneys or other things, either on the score of contract or of some fiduciary relation, of a public or private nature, created by law, or otherwise. That this was the idea contemplated by this statute, is manifest, we think, from the whole tenor of it, and from each particular clause.

It is to be considered, that in practice the action of assumpsit has superseded most other modes of adjudicating upon the rights of parties, where one is to render an account to another for moneys, merchandise, and other property. By the Rev. Sts. c. 118, § 43, the action of account is, in terms, abolished; and it is provided, that when the nature of the account is such that it cannot be conveniently adjusted and settled in an action of assumpsit, it may be done upon a bill in equity. But both the old action of account, and a bill in equity to account, are founded upon a relation in the nature of a trust, or debtor and creditor. 3 Woodeson, 83. 3 Bl. Com. 437.

The term "voucher," in the sense in which it is used in this statute, designates an account book in which charges and acquittances are entered, and it signifies also, any acquittance or receipt, discharging a person, or being evidence of payment. Jacob's Law Dict. Voucher. The term "auditor," designates an officer, either at law or in equity, assigned to state the items of debt and credit between parties, and exhibit the balance. And the "statement of an account," which they are appointed to do, by this statute, implies the same thing.

But in this action the plaintiffs charge the defendant's deputy with a tort, a non-feasance and breach of duty. There is no relation of debtor and creditor, no relation of responsibility for money or property, intrusted by one to another, either in fact or in law; either between the parties or other persons.

The plaintiffs seek to maintain this action mainly for the neglect of the deputy, in not attaching a great number of articles of furniture, provisions, wines, and the like, being the furniture and stock of a large hotel. These articles are so numerous that a list of them would perhaps fill several sheets of paper, and in this respect such a specification would bear some resemblance

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to an account; but it would be so in its appearance only, and not in its nature or character, taking the term "account" as used in this statute. The question before the jury must be, in determining whether the deputy was guilty of the non-feasance and tort complained of in regard to each separate item; was it in that house at the time? Was it the property of Brigham, or of some lodger or guest, or other person? Was it known to the deputy, or could it be discovered by reasonable inquiry and diligent search, or was it shown to him by the plaintiffs or their agent, what was its value? &c. It involves no question of debtor and creditor, no examination of book accounts or other vouchers, no relation in which one party is accountant to the other, or in which any question of accounts can come collaterally in issue. It charges a series of torts, each of which is to be tried and proved, upon competent evidence, in the same manner as if it stood alone; and it does not alter the character of the trial, or the mode of conducting it, or the nature of the proof by which the issue is to be maintained on either side, that it involves a great number of torts, enumerated and stated upon paper, instead of a single instance.

The court would not be understood to intimate, that the authority to appoint auditors to examine vouchers and state an account, depends on the form of the action, and may not extend to an action sounding in tort. The revised statutes use the broadest term, "any case." The *St.* of 1817, *c.* 142, from which it is taken, which is entitled an act for facilitating trials, in civil actions, provides that where in "any action," &c. And we can easily conceive that in some cases of an action for a tort, the statute would be applicable. Suppose an action brought for a malicious civil action or a malicious arrest, an investigation of accounts might be necessary, to show whether any thing was due when the action was commenced. *Pierce* v. *Thompson*, 6 Pick. 193. Again, suppose an action for a libel, charging the plaintiff with embezzlement or peculation, or stigmatizing him as a defaulter, in a public or private relation, the truth of the slanderous imputation being thereby put in issue, a statement of accounts might be of essential importance in the trial.

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But we think the true test in such case will be, whether it appears, after issue joined, that the trial will require an investigation of accounts, or an examination of vouchers by the jury. Believing, in the present case, that although the trial may be tedious and laborious, and require a great mass of evidence in detail, yet that it will not require any investigation of accounts or examination of vouchers, a majority of the court are of opinion, that it is not a case within the statute for the appointment of auditors, without the consent of the parties.

PUTNAM, J. dissented; being of opinion that it was the intention of the legislature to authorize the court to appoint auditors in all cases, whether of contract or tort, where there is a necessity for such an examination of a great number of particulars, as cannot be made, in the ordinary course of a trial, without perplexing the jury, and disqualifying them from arriving, with reasonable certainty, at any accurate result.

Motion overruled.

C. P. Curtis and *B. R. Curtis*, for the plaintiffs.

Sprague and *Gray*, for the defendant.

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John G. Davis *vs.* Caleb Jenney.

The court has authority to grant a new trial on the ground that a verdict is against the weight of evidence, though the evidence, in whole or in part, was derived from inspection.

The comment of a judge upon evidence, not involving any opinion or direction in matter of law, is not a proper ground of exception.

In a suit against the drawer of a bill of exchange drawn for his accommodation, the defence was, that the bill had been altered so as to be payable in sixty days, instead of six; and the only evidence of alteration was on the face of the bill. The judge, after instructing the jury that the question was to be decided upon inspection, also instructed them to consider the probability or improbability that an accommodation bill would be made payable in six days. *Held*, that no exception could be well taken to this last instruction.

If a bill or note is altered, after its execution, by extending the time of payment, it is a material alteration which discharges the party. The burden of proof, however, is on the defendant to show the alteration.

Assumpsit by the indorsee against the payee and indorser of a bill of exchange drawn, as was admitted, for the accommodation of the drawer. The defence relied on, was that the bill was altered, after indorsement, by extending the time of payment from six to sixty days. The only evidence of the alteration arose from the bill itself, which, as the defendant insisted, was manifest on its face. *Morton*, J. before whom the cause was tried, instructed the jury that the burden of proof was upon the defendant to show the alteration; that the question must be decided upon inspection; but that if the jury believed there had been an alteration, the legal presumption was, in the absence of all explanation, that it was made after the bill was signed by the maker and indorser. The judge also directed the jury, that they ought to examine the bill with care, to ascertain whether the difference, if any existed, in the appearance of the letters of the word "sixty," was such as showed an alteration after the bill was completed, or might have been caused by replenishing the ink in the pen, which might be exhausted in the midst of a word or sentence. He also drew the attention of the jury to the fact, that the bill was an accommodation bill, and directed them to consider the probability or improbability that such a bill would be made payable in six days. The verdict

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being for the plaintiff, the defendant's counsel excepted to these instructions, and also moved that the verdict be set aside, because it was against the evidence.

L. Williams, for the defendant. The judge having instructed the jury, that the question as to the alleged alteration must be decided upon inspection, his subsequent direction to them, to consider whether such a bill would be drawn on six days' time, was a departure from the first part of his instructions, and deprived the defendant of the benefit of explanatory evidence, which he otherwise might have given.

The court, upon inspection of the bill, must be convinced that the verdict was against the evidence.

Upon being requested, by the chief justice, to cite authorities in support of the position that alterations are presumed to be made after an instrument is completed, *Williams* referred to *Prevost* v. *Gratz*, Peters C. C. 369. *Morris* v. *Vanderen*, 1 Dall. 67. *Barrington* v. *Bank of Washington*, 14 S. & R. 405. *Heffelfinger* v. *Shutz*, 16 S. & R. 44. *Johnson* v. *Duke of Marlborough*, 2 Stark. R. 313. *Henman* v. *Dickinson*, 5 Bing. 183. *Jackson* v. *Osborn*, 2 Wend. 555. *Knight* v. *Clements*, 3 Nev. & P. 375, and 8 Adolph. & Ellis, 215.

English, for the plaintiff. Where it is doubtful whether an instrument has been altered, the jury must decide. 1 Saund. Pl. & Ev. 94. *Bishop* v. *Chambre*, 3 Car. & P. 55. *Leykariff* v. *Ashford*, 12 Moore, 281.

The jury must also decide whether an alteration, though apparent, was made before or after the instrument was completed. *Cumberland Bank* v. *Hall*, 1 Halst. 215. *Sayre* v. *Reynolds*, 2 South. 737. *Taylor* v. *Mosely*, 6 Car. & P. 273. *Bailey* v. *Taylor*, 11 Connect. 531.

The court cannot overrule the decision of the jury on a question that is to be decided upon inspection. *Morton* v. *Fairbanks*, 11 Pick. 368.

Shaw, C. J. We have no doubt that the verdict, in this case, is open to the inquiry, whether it was against the weight of evidence, and liable to be set aside on that ground. The authority of the court to set aside a verdict does not depend upon

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the nature and quality of the evidence, upon which the jury have found it; though it often happens, that the character of the evidence is such as to afford the jury much better means of judging of it, than the court can have of reviewing it; as where much depends upon localities, and the jury have a view; or upon minute circumstances, and there is conflicting testimony; or upon the credit of a witness, who is strongly impeached by one set of witnesses, and supported by another. In all such cases, the consideration, that the jury had means of judging of facts, which cannot afterwards be laid before the court, in their complete strength and fulness, will always have a prevailing and often a decisive influence upon the judgment of the court, in support of the verdict. The case of *Morton* v. *Fairbanks*, 11 Pick. 368, decides nothing against the power of the court to set aside the verdict, where the evidence, in whole or in part, was derived from inspection. It held, that on a trial, the question of fact must be decided by the jury. But in setting aside a verdict as against evidence, on a motion for a new trial, the court do not find any fact, or decide definitively any question of fact; they merely inquire and decide, whether it is expedient and consonant with the purposes of justice, that the evidence should be submitted to another jury.

The verdict being for the plaintiff, the motion to set it aside, as against evidence, and on account of misdirection, is made by the defendant. It was argued, that there was an inconsistency in the directions of the judge, in telling the jury, that the question was to be decided on inspection of the bill, and afterwards indicating other circumstances. But we think this was given in reference to the evidence as it then stood. The report states, that no evidence was offered but the bill itself. The case was to be decided upon inspection, taken in reference to the relations in which the parties stood to each other, and the admissions made by them, respectively, before the jury. Had the judge stated, that it must be decided by inspection only, without regard to any other considerations, we do not see how it could have been supported. The question, as the evidence stood, was to be determined by inspection; but the inspection was to be made

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by the jury, with eyes and understandings qualified and prepared to make it by a knowledge of the subject matter, the nature, purposes, and effect of such acts, and the relations of the parties to each other.

Another exception was taken to the comments of the judge upon the evidence; but it is well settled, that the comment of a judge upon evidence, not involving any opinion or direction in matter of law, is not a proper ground of exception.

We think that the directions of the judge were sufficiently favorable for the defendant, and were correct, to wit, that a material alteration after the indorsement would discharge the indorser; that an extension of the time was a material alteration, and that the burden of proof was upon the defendant, to show the alteration; or, perhaps, to state this last proposition with a little more precision, the proof or admission of the signature of a party to an instrument is *prima facie* evidence, that the instrument written over it, is the act of the party; and this *prima facie* evidence will stand as binding proof, unless the defendant can rebut it by showing, from the appearance of the instrument itself, or otherwise, that it has been altered.

In regard to the last instruction to the jury, namely, that if they were satisfied that there had been an alteration in the bill, the presumption would be, in the absence of other evidence, that it was done after the signature of the instrument; the court consider it a question of very great importance, which it is not necessary to decide in the present case, and on which they give no opinion. It was wholly in favor of the defendant, and he cannot except to it. Suppose it to have been followed and acted upon by the jury, as regularly we must, it follows that according to the finding of the jury, no alteration had been made in the bill, at any time.

We see no ground to set aside the verdict as against the weight of evidence.

Judgment on the verdict.

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William Barnacoat & others *vs.* Six Quarter Casks of Gunpowder: Tasker H. Swett, Claimant.

Exceptions may be filed, it seems, by either party, on the trial of a libel sued as a process *in rem* for a forfeiture.

Exceptions must be confined strictly to matters of law. It cannot properly be stated, in a bill of exceptions, that certain facts were proved; nor can the court consider the evidence stated in a bill, with a view to set aside a verdict; nor can they found any decision on facts there stated, and not embraced in the issue, or otherwise appearing on the record.

Where issue was joined on the plea of not guilty to a libel for a forfeiture of gunpowder, under *St.* 1833, *c.* 151, and the jury found the respondent not guilty, but also found that the gunpowder was had, kept, and possessed contrary to law, &c. and the judge decreed the gunpowder forfeit, but refused to adjudge that the respondent should pay the costs of the prosecution; and the libellants filed exceptions to such refusal, and set forth the evidence in the bill of exceptions; the exceptions were overruled, and judgment affirmed.

This was a libel originally filed in the office of the clerk of the municipal court, by the engineers of the fire department of the city of Boston, under *Sts.* 1833, *c.* 151, and 1837, *c.* 99, "regulating the storage, keeping, and transportation of gunpowder," in said city. The libel set forth these statutes, and the regulations, made in pursuance of the first of them, by said board of engineers, and alleged that Tasker H. Swett was duly licensed, on the 1st of May, 1839, to keep and sell gunpowder, "by wholesale and retail," at his place of business in Custom House Street, and that on the 20th of said May, he "kept, had, and possessed," at his said place of business, six quarter casks of gunpowder, each containing twenty-five pounds weight, contrary to said statutes and regulations; the same being more than he was authorized to keep, &c. whereby, &c. the said six quarter casks of gunpowder became and were liable to be seized and taken into custody by one or more of said engineers, and were, on the same day, seized, &c. The libel also prayed that said casks of gunpowder might be adjudged forfeit and sold, and the proceeds be paid and appropriated according to said statutes; that said Swett be adjudged to pay the costs of the libel; and that execution issue therefor.

The said Swett was served with a copy of the libel, and was

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summoned to appear and show cause, &c. and, at the June term, 1839, of the municipal court, he appeared and put in his claim and answer, (under protest that he did not thereby waive any objection to the proceedings, on account of want of notice of the seizure to the owners of said gunpowder,) as follows: "And now the said Swett comes into court and says that he is not the owner of said six quarter casks of gunpowder, but that the same is owned by the Kings' Mills Powder Company, of the town of Exeter, in New Hampshire, and he claims the same for the said company, and as their duly authorized agent; and for answer to said libel says that he is not guilty in manner and form as the said libellants have declared against him, and this the said Swett is ready to verify; wherefore the said Swett claims the said six quarter casks of gunpowder as the property of the said Kings' Mills Powder Company, and prays that it may be restored to him as their duly authorized agent, and that the court will award him against said libellants his reasonable costs for the unjust seizure and libel."

The libellants objected to this plea, as offering no issue in relation to the said casks of gunpowder, and as putting said Swett on trial, when he was sued in the court of common pleas* for the penalty provided in the statutes; that court being the tribunal for his trial, and the municipal court the tribunal for forfeiture of the gunpowder, and for awarding costs. They also insisted that the plea was no answer to the libel, that it was immaterial, and that no proper issue to the country could be taken thereon. The judge ruled that the plea was a denial of all the allegations set forth in the process, and that the merits of the case could properly be tried under it, and, therefore, that issue should be joined thereon.

The libellants then moved that proclamation be made, and said gunpowder be decreed forfeit. After the first proclamation was made, the said Swett, as agent of the Kings' Mills Powder Company, of the town of Exeter, interposed a written objection to any decree of forfeiture of the gunpowder, and claimed the same to be restored to said company, the owners

* See the next case, p. 232.

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thereof. The libellants then moved that the other proclamations be made and said gunpowder be decreed forfeit. But the judge ruled that the merits of the case should be tried on said Swett's aforesaid plea of not guilty, and refused to decree a forfeiture until after a trial of an issue on that plea.

To these several rulings of the judge, the libellants excepted, and the exceptions were allowed.

Under said order of the judge, the libellants joined issue on the plea of not guilty. It was set forth in the bill of exceptions, that on the trial of this issue, it was proved that the said Swett was licensed to sell gunpowder by wholesale and retail, in his warehouse in Custom House Street, and that said six quarter casks were seized in said warehouse, where they were lying open on the floor, in bags, and which he had sold but not delivered; and which were put into his warehouse by his servants and agents for the purpose of being delivered to the purchaser, against the general orders of said Swett, in his absence, and without his knowledge. The testimony of a witness to this latter fact, was set forth at large in the bill of exceptions. It was also proved that said Swett, at the time of the said seizure, had four other quarter casks of gunpowder in his copper chest, in his said warehouse.

The judge instructed the jury that if they believed, from the evidence, that the gunpowder was had and kept, at the time, in a situation contrary to the law and to the regulations of the engineers, they might so find that fact; and if they believed, from the evidence, that the gunpowder was carried to Swett's warehouse, without his knowledge or consent, and contrary to his general orders, they might find him not guilty; or that they might find a general verdict of guilty or not guilty, according to the truth of the facts as they had been shown at the trial.

A verdict was returned in the following words: The jury find that said six quarter casks of gunpowder were had, kept, and possessed in the city of Boston, in a building, contrary to the statutes and the rules and regulations of the engineers; and the jury further say that said Swett is not guilty in manner and form as set forth in said libel

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The libellants thereupon filed a motion that the said gunpowder be decreed forfeit, and sold, &c. and that said Swett be ordered to pay the costs of said libel and of the trial, and that judgment be rendered against him and execution issued therefor, notwithstanding the verdict as to him; the same being rendered on an immaterial issue, and being, as to him, contrary to law and evidence, inasmuch as said gunpowder, when it was seized, was in his possession, building, and custody, and no legal cause had been shown by him why judgment and execution for costs should not go against him. But the judge granted so much only of this motion as related to a decree of forfeiture, and refused to adjudge that the claimant pay costs.

The libellants excepted to the decision which exempted the claimant from payment of costs, and the exception was allowed.

By *St.* 1833, *c.* 151, § 3, the board of engineers of the city are authorized to establish rules and regulations, directing the manner in which gunpowder may be kept by licensed dealers and other persons, and to direct and require all such precautions as may appear to them to be needful and salutary to guard against danger, &c.

By § 5, all gunpowder which shall be had, kept, and possessed, &c. contrary to the provisions of said statute, or the regulations of the board of engineers, may be seized by any one or more of the engineers of said city, and the same shall, within twenty days next after the seizure thereof, be libelled, by filing, in the office of the clerk of the municipal court, a libel, stating the time, place, and cause of such seizure; and service is directed to be made on the person in whose custody or possession such gunpowder shall have been seized, that he may appear and show cause why it should not be adjudged forfeit. And if the same shall be adjudged forfeit, such person shall pay all costs of prosecution, and execution shall be issued therefor. Provided, (among other things,) that if the person, in whose custody or possession such gunpowder may be seized, shall be unknown to the engineer who seizes it, or if, at the time of seizure, it may not be in the custody or possession of any person, then the court may proceed to adjudication thereon.

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By the tenth section of the rules and regulations of the board of engineers, any person or firm, who may be licensed to sell gunpowder "by wholesale or retail," shall be allowed to have on hand a quantity not exceeding, at any one time, three quarter casks, of twenty-five pounds each, which shall be deposited in a copper chest, &c. provided, however, that such person or firm may be allowed to keep on hand, in addition to the above, such quantity as is required for retailing, which shall not exceed, at any one time, twenty-five pounds.

The statute of 1837, *c.* 99, altered the amount of the penalties, &c. imposed by *St.* 1833, *c.* 151, and also the disposition to be made of them when recovered.

S. D. Parker, for the libellants. The claimant is liable, in this case, though not intentionally guilty. He is liable for the acts of his servants. 4 Inst. 114. *Idle* v. *Vanbeck*, Bunb. 230. *Lane* v. *Cotton*, 12 Mod. 489. *Michael* v. *Alestree*, 2 Lev. 172. *Blewitt* v. *Hill*, 13 East, 13. *Rex* v. *Almon*, 5 Bur. 2686. *Attorney General* v. *Siddon*, 1 Crompt. & Jerv. 220. In revenue cases, it is not necessary, in order to charge a party, that he should be privy to the act which causes a forfeiture. *Mitchell* v. *Torup*, Parker, 227, 235. *Cross* v. *United States*, 1 Gallis. 28. *The Ann*, 1 Gallis. 62.

Not guilty was not the proper plea. It did not touch the article forfeited, nor the question of forfeiture. The owner must put the forfeiture in issue. 7 Dane Ab. 453. 7 Cranch, 571, per Jones, *arguendo*. Parker, *ubi sup.* The provision of Rev. Sts. *c.* 100, § 27, as to pleading the general issue, does not apply to libels *in rem*.

Costs, in all cases of this nature, follow the forfeiture

Fletcher, for the claimant. As the libel alleged that the claimant had, kept, and possessed the gunpowder, contrary to the statutes, &c. and prayed a decree of forfeiture on that ground, no other plea but not guilty would have been proper. But if the plea was bad, the libellants should have demurred to it. Courts are not bound to quash bad pleadings on motion. In the case in Parker, 227, the libel was against the goods only.

The finding of the jury, except as to the claimant's being not

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guilty, was nugatory; because the forfeiture was claimed solely on the ground, that the gunpowder had been had, kept, and possessed by him contrary to law. Parker, 236. But the propriety of the decree of forfeiture is not open on this record, as the claimant took no exceptions thereto.

The Rev. Sts. c. 86, § 11, do not entitle the libellants to a bill of exceptions in this case. This is a criminal proceeding, in which the respondent only can except to the directions, &c. of the court. Rev. Sts. c. 138, §§ 11, 13.

Shaw, C. J. A question was made, in the present case, whether the libellants could have a bill of exceptions. Without examining the question critically, the court are of opinion, that a libel, sued as a process *in rem* for a forfeiture, is in the nature of a civil action, and that either party may file exceptions in matter of law.

But we think that there is much matter in this bill of exceptions, which is irrelevant, and cannot properly be introduced in a bill of exceptions. It is stated that certain facts were proved, and in one instance the court was requested to state the evidence at large, with a view to sustain the motion on an alleged statement of facts. Much of the argument has been founded upon facts so introduced. We think that exceptions must be confined strictly to matters of law; that it cannot be stated in a bill of exceptions that certain facts were proved. It may properly be stated, that evidence was offered tending to prove certain facts; but this is done only to show the relevancy, pertinency, and correctness of the opinions and directions of the court, in matter of law, upon such evidence. Nor can a court consider the evidence in a bill of exceptions, with a view to set aside a verdict, nor found any decision or judgment on facts, stated in a bill of exceptions, but not embraced in the issue, or otherwise appearing on the record.

It was objected, that "not guilty" was not a good plea, and ought not to have been received. Looking at this libel, it manifestly appears to embrace two subjects, and to have two objects in view; the one, to show the gunpowder liable to forfeiture, and the other, to show the respondent, Swett, liable for the

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costs; both allegations being warranted by the statute; and if the facts were proved, the powder would be liable to forfeiture, and Swett to the payment of the costs. But one of these charges might be true, and not the other. And this is contemplated by the statute, which provides for a forfeiture without costs, when the person having the custody and possession of the powder is not known, or cannot be found, or when, at the time of seizure, it is not in the custody or possession of any person The court are of opinion, that as to all those averments which went to cast an imputation of a violation of the law upon Mr. Swett, and charge him with the costs, not guilty was a good plea. Whether it was good to the forfeiture, we need give no opinion. If it was, still the jury negatived it, and then the judgment of forfeiture was right. If it was not, then there was no plea, and the judgment was good upon *nil dicit*. And to that judgment there is no exception.

In considering whether there was any error in ruling, that the respondent was not liable for costs, we are obliged, for reasons already given, to lay out of the case all the evidence detailed in the bill of exceptions, tending to show where the powder was found, and look only to the finding of the jury. Looking at the verdict only, it appears judicially, that this gunpowder, when seized, was not in the custody or possession of Mr. Swett, within the meaning of the statute of 1833, *c.* 151, § 5, on which this process is founded. If the libellants were desirous of more specific directions in point of law, as to what constitutes custody and possession; whether an individual under this statute is liable for the acts of his servants, clerks, attendants, and persons employed by him; whether it extends to acts done on his premises, without his knowledge; or whatever other acts or permissions constitute custody and possession, within the true intent and meaning of this statute; a request for such instructions to the jury, for their guidance, should have been made. If given, they would have had the benefit of them; if refused, they would have been entitled to take exceptions, and if the exceptions were sustained, that is, if the instructions prayed for ought to have been

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given, they would have had the benefit of them, on a new trial. The court are of opinion that the judgment was right, on both points; and whether the true and proper reasons were assigned for it, or not, is immaterial.

Exceptions overruled and judgment affirmed.

FREDERICK A. COLBURN *vs.* TASKER H. SWETT.

As a general rule, a common informer cannot maintain an action for a penalty, unless power is given to him for that purpose by statute.

The board of engineers of the fire department of the city of Boston, to whose use the penalties incurred by violation of *Sts.* 1833, *c.* 151, and 1837, *c.* 99, are made to enure, (except when any one of them shall be examined as a witness in the prosecution,) cannot authorize any person to sue for those penalties.

Since the passing of *St.* 1837, *c.* 99, and the repeal of the fourth section of *St.* 1833, *c.* 151, it seems that the only mode of enforcing the penalties imposed by those statutes, is by indictment, or suit in the name of the Commonwealth.

TRESPASS upon the case, to recover of the defendant the forfeiture incurred under *St.* 1837, *c.* 99, for violation of the provisions of *St.* 1833, *c.* 151, and of the rules and regulations of the board of engineers of the fire department of the city of Boston, respecting the keeping, having, and possessing of gunpowder.

By the fourth section of said statute of 1833, one moiety of the sums forfeited by violating said provisions and regulations, accrued to the use of any person or persons who should prosecute for the same, and the other moiety to the use of the poor of the city. By *St.* 1837, *c.* 99, said fourth section of the former statute was repealed, and it was enacted that the fines, penalties, and forfeitures, mentioned in that statute, should enure to the sole use of the board of engineers aforesaid; provided, that whenever, on the trial of any prosecution, any one of said engineers should be sworn and examined as a witness on behalf of the prosecution, the fine, &c. should enure to the use of the poor of the city. But this last statute contained no provision concerning the form of prosecution, or the party who might prosecute, for the said fines, &c.

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The plaintiff, after his name and addition in the writ, described himself, as " clerk of the chief engineer," &c., as is hereinafter mentioned in the opinion of the court.

At the trial before *Putnam*, J. the evidence adduced to support the action was the same, so far as it related to the defendant's liability to the forfeiture, as that which was given in the municipal court, in the preceding case of the libel filed by *Barnacoat & others*. *Ante*, *p.* 227.

By *St.* 1837, *c.* 99, § 1, any person who shall have, keep, or possess any gunpowder, contrary to the provisions of *St.* 1833, *c.* 151, or to the rules and regulations of the board of engineers, shall forfeit a sum not less than $ 100, nor more than $ 500. The other statute provisions, and the regulations of the board of engineers, on which this action was founded, are set forth in the preceding case. *pp.* 228, 229.

A verdict was taken for the plaintiff, subject to the opinion of the court as to his right to prosecute the action, and as to the liability of the defendant to the fine sued for.

As to the plaintiff's right to prosecute the action,

S. D. Parker, for the plaintiff, cited Plowd. 199. *Roe* v *Roe*, Hardr. 185. *Malden* v. *Bartlett*, Parker, 105.

Fletcher, for the defendant, cited *Vinton* v. *Welsh*, 9 Pick. 87. *Fleming* v. *Bailey*, 5 East, 313. 2 Saund. Pl. & Ev. 830.

Shaw, C. J. Several points were argued in this case, upon which the court give no opinion, because they are of opinion that the action cannot be maintained by this plaintiff. The suit is brought to recover a penalty, upon *St.* 1833, *c.* 151, being an act in regard to the storage, &c. of gunpowder in Boston. The plaintiff is described, as " clerk of the chief engineer of the city of Boston, and acting and prosecuting in this behalf under a vote of the engineers, &c., passed on the 20th of May, 1839, authorizing and directing him to prosecute and collect the fine hereinafter mentioned, incurred by said Swett for a violation of the law in relation to the storage and selling of gunpowder in said Boston." As there is no statute provision, which authorizes any such officer to sue for the penalty, and as there is no provision

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investing the board of engineers with power to appoint any person to sue for the penalty, the plaintiff's case is not aided by this description of his person, — for we think it nothing more. If his legal title to recover depended upon any act or vote of the engineers, it must be duly averred in the declaration, as a fact which might be traversed and must be proved. The question then resolves itself into this, whether this penalty can be recovered in a popular action by any one who will sue for it; because if it may be, then the elaborate *descriptio personæ*, contained in the writ, may be rejected as surplusage, and the plaintiff stand on the same footing with any person who should first bring an action *qui tam*.

It is a general rule, that no action for a penalty can be maintained by a common informer, unless power is given to him for that purpose by the statute. *Fleming* v. *Bailey*, 5 East, 313. *Barnard* v. *Gostling*, 2 East, 569. *Davis* v. *Edmonson*, 3 Bos. & Pul. 382.

By *St.* 1833, *c.* 151, § 4, as passed, it was declared, that one moiety of the sums thereby forfeited should accrue to the use of the poor of Boston, the other moiety to the use of any person or persons, who should prosecute for the same. But by *St.* 1837, *c.* 99, the fourth section of the abovenamed act, enabling any person or persons to sue for the same, was repealed, and no mode of prosecuting for the penalties was substituted. By this last act, it is provided, that all the fines, penalties, and forfeitures, shall enure to the sole use of the board of engineers, with a proviso, that whenever, on the trial of a prosecution under the said acts, any one or more of the engineers shall be examined in behalf of the prosecution, the whole penalty shall enure to the use of the poor of Boston.

There being then no mode provided in the statute itself, for prosecuting for the penalties, they must either be prosecuted for, under the general laws, or the law will go unexecuted.

Whether an action would lie in the name of the engineers, we give no opinion. It seems to be held, that when a penalty is given wholly to one or more persons, an action will lie for it in the name of those persons, although no express authority to sue

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for it is contained in the statute. *Pres. & Coll. Physicians* v. *Salmon*, 1 Ld. Raym. 682. To the application of this rule, however, to these statutes, there are some objections; which are, that the penalty is not given absolutely to the engineers, but in a certain contingency, that of an engineer's testifying, it is to go to the poor; because, by providing that the engineers may be examined as witnesses for the prosecution, the statute carries an implication, that the prosecution is not conducted in their names; and because they do not take the penalty as individuals, but as a body, acting for the public, the individual members composing which are frequently changing.

But whether an action would lie in the name of the engineers or not, we think there is no ground to maintain that the law would be imperative, because it is a general rule of the common law, that where a statute prohibits a matter of public grievance, or commands a matter of public convenience, and no special mode of prosecution is directed, it may be prosecuted by indictment. 2 Inst. 163. 2 Hawk. c. 25, § 4. *The King* v. *Sainsbury*, 4 T. R. 457. The legal right of recovering, in such case, is in the Commonwealth, though the penalty, in whole or in part, may be reserved to the use of others.

By Rev. Sts. c. 118, § 42, it is provided, that when any pecuniary forfeiture or fine was, or should thereafter be imposed by law, without any express provision for the mode of recovering the same, it may be sued for and recovered, in an action of debt, or an action of trespass on the case, in any court proper to try the same.

This is similar in terms to the provision of *St.* 1793, c. 43, § 4, except that the revised statutes give an action of trespass on the case, as well as debt, at the election of the prosecutor; whereas the former statute gave an action of debt only.

This provision does not declare, by whom such action must be brought; and it was contended in the argument, that this provision warranted an action in the name of any one who would sue for the same. But we think such is not the true construction. We are inclined to the opinion, that it was the purpose of this provision, not to enable any person to prosecute, but to di-

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rect how the prosecution, on the part of any one entitled, should be conducted. It designed to leave to other rules of the common or statute law, to determine in whom is the right to sue, and to direct the mode of suing. The result would be, that when the statute gave a right in express terms, or by implication, to any person who should first sue, or to any particular person or body of persons, to institute a prosecution, then it might be done in the form of an action of debt, or an action of trespass on the case. But when no such right is given to any individual or body of individuals, then, as the right to enforce all penalties, made to ensure obedience to general laws, is in the Commonwealth, such action of debt or case, might be prosecuted by the Commonwealth.

The court, being of opinion that this action cannot be maintained, have not found it necessary to consider the other exceptions.

Plaintiff nonsuit

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William Wright *vs.* Abraham A. Dame & others.

A member of a corporation, though not an officer or agent thereof, may rightly be made a party to a bill in equity against the corporation and individuals, for discovery and relief, and is bound to answer, on oath, so much of the bill as seeks for a discovery of matters affecting the corporation.

It is not necessary that such bill should aver that the member of the corporation, who is thus made defendant, has any information which is not possessed by other members thereof; nor need the bill assign any special reason for requiring such defendant to make the discovery prayed for.

Where a bill for discovery and relief is filed against a party who is not liable to a decree for relief, but is bound to make discovery, a demurrer by him to the whole bill will be overruled: He should demur only to that part of the bill which seeks relief.

After a demurrer of record, to the whole bill, is overruled, the defendant may demur *ore tenus* to the part of the bill which is demurrable, and such demurrer will be allowed. But he will not be allowed his costs.

Bill in equity against Dame, the South Wharf Corporation, George Morey, a member of said corporation, and others, praying for discovery and relief. The bill alleged that the plaintiff had conveyed lands to Dame on certain trusts, and that Dame afterwards, in execution of said trusts, agreed with H. S. Kendall to convey the lands to him, and the plaintiff joined with Dame in conveying the lands to Kendall, who had knowledge of said trusts, upon an express agreement that such conveyance should not affect said trusts, nor the rights of the plaintiff, nor the duties or liabilities of Dame and Kendall; and that Kendall conveyed said lands to the South Wharf Corporation, the members of which corporation knew of the trusts aforesaid, and therefore took the lands subject thereto; but that Dame, Kendall, and said corporation, had combined, &c., and refused to perform the said trusts. (See the bill more fully set forth, 22 Pick. 55.)

The defendant, Morey, demurred to the whole bill.

Bartlett, in support of the demurrer. As the members of the South Wharf Corporation cannot be decreed to execute the trust which the bill alleges to have attached to the property conveyed to the corporation, and the bill prays for relief, the demurrer was well taken. Story Eq. Pl. 253. Mitf. Pl. (3d ed.) 130. If the bill against the members of the corporation had been for discovery only, could they have been rightfully

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made defendants, it being averred that they had knowledge of the trust? It is submitted that they are to be examined as witnesses only, and not as defendants. It is, in general, good cause of demurrer that those, who are mere witnesses, are made parties to a bill. Cooper Eq. Pl. 41, 42. Story Eq. Pl. 201. One exception to this rule is the case of officers and agents of corporations, who partake in their transactions, and are made parties merely for the purpose of discovery. 2 Story on Eq. 715. Beames Eq. Pl. 132. Cooper Eq. Pl. 202. 1 Hoffm. Ch. Pract. 239. *Fenton* v. *Hughes*, 7 Ves. 289. The court will not extend this exception. Unless the defendant is an officer or agent of the corporation, or the bill shows that he was a participator in the transaction, he cannot be made a party. Story Eq. Pl. 202. *How* v. *Best*, 5 Mad. R. 19.

It is not alleged in this bill that Morey has any more knowledge of the subject of complaint than any other member of the corporation; nor is any special reason assigned, in the bill, for requiring of him the discovery prayed for.

The only case, that has been found in the English books, where any one but an officer of a corporation has been made defendant, is *Dummer* v. *Corporation of Chippenham*, 14 Ves. 245; and that was a case of a charge against the corporators themselves, as the persons who did the wrong complained of in the bill. See *Vermilyea* v. *Fulton Bank*, 1 Paige, 37. *Le Texier* v. *Margravine of Anspach*, 15 Ves. 164.

Choate, for the plaintiff. This demurrer is too broad, and must be overruled if corporators may be made parties either for relief *or* for discovery. Hinde Ch. Pract. 149. *Higinbotham* v. *Burnet*, 5 Johns. Ch. 186. Corporators are proper parties for a discovery. Edwards on Parties, 49. *Brumly* v. *Westchester County Manuf. Society*, 1 Johns. Ch. 366. *Dummer* v. *Corporation of Chippenham*, 14 Ves. 245. *Fulton Bank* v. *Sharon Canal Company*, 1 Paige, 219. *Wych* v. *Meal*, 3 P. W. 310. These cases establish the doctrine that corporators, and even *former* officers of a corporation, may be made parties to a bill of discovery. In this Commonwealth, where corporations are greatly multiplied, and draw within their control so vast

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an amount and variety of transactions, the rule already established will be applied liberally.

PUTNAM, J. This bill is for discovery and relief. The South Wharf Corporation is a party, and George Morey, a member of the corporation, is a party also, and has filed a general demurrer to the whole bill.

The first question is, whether the members of a corporation may be made parties, so far as the plaintiff seeks for discovery only, or whether the plaintiff shall be confined to an examination of the corporators as witnesses. The defendant, Mr. Morey, contends that he is liable to answer only as a witness, while the plaintiff insists on the right to proceed against him as a party.

A little more than a century ago, it was held by Lord *Talbot*, that an officer of the East India Company was properly made a defendant, in order to discover some entries and orders of the company. *Wych* v. *Meal*, 3 P. W. 310. And it seems to us to have been so ruled upon the soundest reason. The principle of equity is, that the plaintiff shall have a full discovery of material facts under the sanction of the oath of the party in interest. The answer of a corporation, under its common seal, gives no such sanction. The court cannot but see that the name of a corporation is but the name which the individual members of the corporation have taken or accepted. The corporators themselves are really the persons interested, and who should, upon the principles of equity, be called upon to make discovery upon their oaths.

The case of *Wych* v. *Meal*, above cited, was against an officer of the East India Company; and the defendant, in the case at bar, not being an officer of the South Wharf Corporation, denies the applicability of that case to this. But we cannot think that the rule should be confined to the officers of a corporation. The individuals, who are not officers, may be those only who know the facts sought to be discovered. In the present case, for example, whether the corporation was affected with knowledge of the alleged trust and charge upon the estate, which has been conveyed to it, at or before the time when it received the deed, may have been carefully concealed from its

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officers, though well known to other individual corporators. Nor is authority wanting, ancient and modern, on this point. In 1 Vern. 117, there is an anonymous case of a bill against a corporation for the discovery of writings. The defendants answered under their common seal, but nothing to their prejudice; and the court ordered that the clerk of the company, and such principal members thereof, as the plaintiff should think fit, should answer on oath. In *Dummer* v. *Corporation of Chippenham*, 14 Ves. 245, this point was ruled by Lord *Eldon*, and the individual members of a corporation, trustees for a charity, were compelled to answer upon their oaths. See also Edwards on Parties, 49.

It was objected that this practice would be inconvenient and onerous to the individual corporators, against whom it is not pretended that any decree for relief can be made. But we think that where discovery only is sought, the costs which must be paid to the party, in such case, would prevent the evils which have been apprehended.

The examination of the corporator, as a party, is obviously much more beneficial than an examination of him as a witness. As a party, he will be obliged to answer to such interrogatories upon such topics as the plaintiff shall propose, and will not have the opportunity to do away the effect of his answer, as a witness, upon a cross-examination, might be enabled in a great measure to accomplish.

We are all of opinion, that Mr. Morey is bound to answer, so far as the bill seeks for a discovery, notwithstanding there is no allegation in the bill that he possesses any information which was not common to other individual members of the corporation. It is to be presumed that the plaintiff had good reason to believe that the members of the corporation, on whom he called for an answer, had material information, and might make a discovery which would be beneficial; and, therefore, if the plaintiff thinks fit, he has a right to make such member a party, for the purpose of discovery.

But it is certain that no relief can be had against the defendant, as an individual corporator. His answer will not be evidence against the corporation; but it may be, nevertheless, of

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the utmost use to the plaintiff, in the further prosecution of the cause.

The question then is, whether the demurrer shall hold, inas much as the plaintiff has sought for relief as well as discovery We adopt the old rule of pleading in equity, that on a general demurrer to the whole bill, if there is any part, either as to the relief or discovery, to which the defendant ought to put in an answer, the demurrer, being entire, ought to be overruled. 1 Harrison Ch. Pract. (7th ed.) 414. *Higinbotham* v. *Burnet*, 5 Johns. Ch. 186. This was the practice formerly adopted in England, and at present continued in New York. Story Eq. Pl. 253, 254, *note*. The defendant should answer as to the discovery, and demur as to the relief. *Laight* v. *Morgan*, 1 Johns. Cas. 434. The demurrer of record is therefore overruled. But the defendant now demurs *ore tenus* to the prayer for relief, and that demurrer is allowed; but without costs.

The defendant must answer to that part of the bill which seeks discovery, and will thereupon be entitled to his costs.

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Augustus Thorndike *vs.* City of Boston.

A citizen of Boston, who had been at school in the city of Edinburgh when a boy, and formed a predilection for that place as a residence, and had expressed a determination to reside there, if he ever should have the means of so doing, removed with his family to that city, in 1836, declaring, at the time of his departure, that he intended to reside abroad, and that if he should return to the United States, he should not live in Boston. He resided in Edinburgh, and the vicinity, as a housekeeper, taking a lease of an estate for a term of years, and endeavoured to engage an American to enter his family for two years, as instructor of his children. Before he left Boston he made a contract for the sale of his mansion house and furniture there, but shortly afterwards procured said contract to be annulled, (assigning as his reason therefor, that in case of his death in Europe, his wife might wish to return to Boston,) and let his house and furniture to a tenant. *Held*, that he had changed his domicil, and was not liable to taxation as an inhabitant of Boston, in 1837.

In an action to try the question whether the plaintiff, who had left the country with his family, was liable afterwards to be taxed as an inhabitant of the place of his former residence, a letter from him to his agent in that place, expressing his intention to reside abroad permanently, is admissible in evidence, if written before he knew that a tax had been assessed upon him, though written after the assessment. *Aliter*, it seems, of such letters written after he knew that he was taxed.

When evidence has been improperly received or rejected, and a verdict is found against the party taking the exception, and a motion for a new trial is made on that ground, such motion will not be granted, if the court can see plainly, from the whole evidence, that independently of the evidence received or rejected, the evidence in support of the verdict so decidedly preponderates, that a verdict the other way would be set aside as against evidence.

Assumpsit for money had and received, to recover back the amount of a poll tax and a tax on the personal property of the plaintiff, assessed upon him in the year 1837, by the assessors of the city of Boston, and paid to the city collector, under protest, in order to prevent a distraining of the plaintiff's property.

It appeared from the report of *Wilde*, J. before whom the case was tried, that in the year 1836, the plaintiff was an inhabitant of Boston, but in the month of October in that year, he went with his family to Edinburgh in Scotland, where he lived at lodgings for a short time, and afterwards went to housekeeping, taking a governess into his family for his younger children; that his principal residence, ever since, had been at Edinburgh, but during a part of each year he had lived on an estate, in the neighborhood of that city, which he had hired for a term of

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years; that in July, 1837, the plaintiff came to Boston on private business, where he remained a few days only, and then returned to his family in Edinburgh.

It also appeared that the plaintiff, while a boy, was at school in Edinburgh for four years previous to 1813, and on his return to this country in that year, and on numerous occasions since (the last of which was not more than a year or two before his removal, in 1836) he expressed a great predilection for Edinburgh as a place of residence, and a desire and intention to live there, if he ever should have the means to enable him to do so; that about the time of his departure in 1836, and while making his preparations, he declared to two of his friends his intention to reside abroad, as long as his wife should be pleased with or like such residence; and that he should stay as long as he could, and if he ever should come back to this country, he should not live in Boston, as he preferred New York or Baltimore; and that in April, 1837, he requested a friend then in Edinburgh, and about to return to Boston, to make a contract, for two years, with a gentleman in this country, to go out to the plaintiff for the purpose of superintending the education of his children.

It further appeared, that in the winter previous to the plaintiff's removal, he made a contract for the sale of his mansion house and furniture in Boston, but shortly afterwards procured the contract to be annulled, giving as his reason for so doing that in case of his death in Europe his wife might wish to return to Boston; and before he went away, he let the house and furniture to a tenant, who still occupies it.

Several letters of the plaintiff, (the first dated Oct. 27th, 1837, and the others between that day and July, 1838) to his agent in Boston, giving instructions as to his property and directing the sale of his mansion house, if a certain price could be obtained, and declaring his intention not to return to Boston to live, were read to the jury, though the defendants objected to their being admitted in evidence.

The judge instructed the jury, that the question for them was, whether the plaintiff's residence was in Boston, on the 1st of May, 1837; that if they were satisfied that the plaintiff

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went abroad, not for the mere purpose of travelling or for any particular object, intending to return when that was accomplished, but with the intention of remaining abroad for an indefinite length of time, or with the intention of not returning to Boston to live, even if he should ever return to the United States, then he ceased to be an inhabitant of Boston for the purposes of taxation there.

The jury returned a verdict for the plaintiff, and the defendants moved for a new trial because of misdirection, and also because the letters before mentioned were admitted in evidence.

J. Pickering, (City Solicitor,) for the defendants, questioned the correctness of the instructions to the jury; but relied principally on the exception to the admission of the defendant's letters in evidence. All those letters were written after the tax was assessed, and the first of them was dated a year after he left Boston. The others were written at a still later date. They were not proper evidence of the plaintiff's intentions at the time he left the country. They formed no part of the *res gesta*. Declarations of a party must be contemporary, in order to be admissible in his favor. In cases of bankruptcy, greater latitude is allowed; but the bankrupt's declarations are received as his confessions, and against his interest. *Bateman* v. *Bailey*, 5 T. R. 512. *Robson* v. *Kemp*, 4 Esp. R. 233. *Kent* v. *Lowen*, 1 Campb. 177. *Marsh* v. *Meager*, 1 Stark. R. 353. *Rex* v. *Cotton*, 3 Campb. 444. *Rawson* v. *Haigh*, 1 Car. & P. 77. *Schooling* v. *Lee*, 3 Stark. R. 149. *Pool* v. *Bridges*, 4 Pick. 378. If the letters were improperly received in evidence, a new trial must be granted. The court cannot say that the verdict must have been for the plaintiff, if the letters had not been admitted, even under the rule adopted in *Crease* v. *Barrett*, 1 Crompt. Mees. & Rosc. 919; *Wright* v. *Tatham*, 7 Adolph. & Ellis, 313; and *Rutzen* v. *Farr*, 4 Adolph. & Ellis, 56.

Gardiner and *English*, for the plaintiff. The instructions to the jury were correct. 5 Greenl. 143. 266. Story's Conflict of Laws, 42. 45. *Putnam* v. *Johnson*, 10 Mass. 501. *Turner* v. *Buckfield*, 3 Greenl. 231. *Knox* v. *Waldoborough*, 3 Greenl. 457. *Parsonsfield* v. *Kennebunkport*, 4 Greenl. 47

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The Venus, 8 Cranch, 279. *Attorney General* v. *Coote*, 4 Price, 183. 2 Bos. & Pul. 230, *note*. *Balfour* v. *Scott*, 6 Bro. P. C. 550. *Wrigley's case*, 8 Wend. 134. 1 Binn. 352, *note*. *Elbers* v. *United Ins. Co.* 16 Johns. 133. Tomlin's Law Dict. (Granger's ed.) tit. Domicile.

The letters were received to show the plaintiff's intention, which was the turning point of the case. His acts had been shown before his letters were read to the jury. In *Richmond* v *Vassalborough*, 5 Greenl. 396, a party was allowed, long after he removed from a place, to state to the jury his intention when he removed. See also *Allen* v. *Duncan*, 11 Pick. 308. *Rawson* v. *Haigh*, 2 Bing. 104. *Doe* v. *Arkwright*, 5 Car. & P. 575. *Jennison* v. *Hapgood*, 10 Pick. 89. *Makepeace* v. *Lee*, cited 5 Pick. 378. *The Indian Chief*, 3 Rob. 19.

But if the letters were not admissible, the evidence was decisive without them, and therefore a new trial will not be granted. *Prince* v. *Shepard*, 9 Pick. 176. *Stiles* v. *Tilford*, 10 Wend. 338.

Shaw, C. J. The object of the present action is to recover back a sum paid by the plaintiff to the city, for a tax upon his poll and personal property, as an inhabitant and resident of the city, in May, 1837, and which he insists was wrongfully assessed upon him, because he had then ceased to be an inhabitant of the city.

The questions of residence, inhabitancy or domicil, — for although not in all respects precisely the same, they are nearly so, and depend upon much the same evidence, — are attended with more difficulty than almost any other which are presented for adjudication. No exact definition can be given of domicil; it depends upon no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case. It is a maxim, that every man must have a domicil somewhere; and also that he can have but one. Of course it follows, that his existing domicil continues until he acquires another; and *vice versâ*, by acquiring a new domicil, he relinquishes his former one. From this view it is manifest that very slight circumstances must often decide the question. It depends upon the preponderance of the evidence in favor of two or

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more places; and it may often occur, that the evidence of facts tending to establish the domicil in one place, would be entirely conclusive, were it not for the existence of facts and circumstances of a still more conclusive and decisive character, which fix it, beyond question, in another. So on the contrary, very slight circumstances may fix one's domicil, if not controlled by more conclusive facts fixing it in another place. If a seaman, without family or property, sails from the place of his nativity, which may be considered his domicil of origin, although he may return only at long intervals, or even be absent many years, yet if he does not by some actual residence or other means acquire a domicil elsewhere, he retains his domicil of origin.

The jury in the present case found a verdict for the plaintiff, thereby affirming the position that he was not an inhabitant of Boston, liable to be taxed, in May, 1837; and the defendants have moved for a new trial on several legal grounds.

The first question is, whether the instructions of the court to the jury were correct. There was evidence tending to show, that when the plaintiff removed with his family to Edinburgh, in 1836, he did it with the intention of fixing his residence permanently in Scotland; and also, that if he should return to the United States, he should not return to Boston, but settle in New York or Baltimore. In reference to this evidence, the jury were instructed, that if they were satisfied that the plaintiff went abroad, not for the mere purpose of travelling, or for any particular object, intending to return when that was accomplished, but with the intention of remaining abroad for an indefinite length of time, or with the intention of not returning to Boston to live, in the event of his return to the United States, then he ceased to be an inhabitant of Boston, liable to taxation.

We think this direction, in connexion with the subject matter to which it applied, was correct. The actual change of one's residence, with his family, and the taking up of a residence elsewhere, without any intention of returning, is one of the strong indications of change of domicil, and, unless controlled by other circumstances, is decisive. It was for the jury to determine whether there were any circumstances sufficient to control such

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conclusion. If the plaintiff had left Boston and actually taken up a residence, with his family, in Scotland, without any intention of returning, thereby assuming that country as his definite abode and place of residence until some new intention had been formed or resolution taken, he had ceased to be an inhabitant of Boston, liable to taxation for his personal property.

The next question is upon the admission of several letters of the plaintiff. They were offered on the ground that they were declarations of the plaintiff, accompanied with his acts of removal from Boston to Edinburgh, addressed to his agent in the ordinary course of his business, and were, therefore, as *res gesta* good evidence of his intentions connected with those acts. The court are of opinion that the letter of October 27th, 1837, was admissible on this ground. The taxes are assessed as of 1st May; but it is well known that the assessment is made in the course of the summer, and the tax bills issued in September. There is no proof from the tenor of the letter or other evidence, that at that time the plaintiff knew that the tax had been assessed upon him. It was written, therefore, before any controversy, and before he had any interest to make evidence for himself on this subject. *Doe* v. *Arkwright*, 5 Car. & P. 575. The admissibility of the later letters is much more questionable. The admission of declarations, either written or verbal, in connexion with acts done, and giving a character to such acts, depends much on circumstances, and upon the nearness or distance of the time of the declarations made to the act done. The most common instances arise in cases where certain acts, done with certain intentions, constitute acts of bankruptcy, and the intention is the main queston; declarations of the bankrupt, verbal or written, at a near time of the act done, are admissible. *Marsh* v. *Meager*, 1 Stark. R. 353. But in this case, the letters were written after the suit brought, and we are strongly inclined to the opinion that they were not admissible. Then an important question arises, whether on that ground a new trial ought to be granted.

It has sometimes been said by judges of English courts, that an application for a new trial, being to the discretion of the court

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they will not grant it, if on the whole the court can see that justice has been done. *Doe* v. *Tyler*, 6 Bing. 561. *Horford* v. *Wilson*, 1 Taunt. 12. There seem, however, to be obvious difficulties in placing the matter upon this ground. It is not always easy for the court to distinguish between the force and effect of the competent and incompetent evidence, and to say with certainty, that the latter has had no influence in deciding that justice has been done, and that the evidence, independently of the incompetent evidence admitted, is sufficient to warrant the verdict. But there is an objection deeper and more formidable in point of principle than this; it arises from that fundamental rule in the conduct of jury trials, that it is as much the province of the jury to ascertain the truth of facts upon competent evidence, as it is the province of the court to decide upon the competency of evidence, and generally upon the rules of law by which a jury are to be governed. This consideration, taken in connexion with the difficulty of ascertaining upon a mass of evidence, some of which is incompetent, how great an effect is to be attributed to the incompetent evidence, renders it difficult to say, that the incompetent evidence was not the turning weight in the scale which caused the verdict.

It is, however, manifest in many cases, and it must be obvious to those who are conversant with the conduct of jury trials, that after a long trial, embracing a great variety of evidence, the admission or rejection of a particular piece of evidence is wholly immaterial. It not unfrequently occurs, that in the early stage of a cause, evidence is admitted which ought to have been rejected, or rejected, which ought to have been admitted; and afterwards, in the further progress of the trial, other evidence, unobjectionable, is offered, which renders the evidence before admitted or rejected wholly immaterial. It may either prove the same fact by evidence wholly unobjectionable, or by placing the cause in another aspect, show it to be wholly immaterial. In such a case, it would seem to be inconsistent with the great purposes of jury trial — the discovery of truth and the attainment of justice — to adopt and apply an inflexible rule, that such a verdict must be set aside and a new trial ordered, especially

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when it appears upon the whole evidence that another verdict, upon the same evidence, rejecting the incompetent evidence which had been admitted, or adding the competent evidence which had been rejected, must be the same as it is, or be plainly wrong.

But we think there is one rule upon this subject which may be safely adopted, and which is perfectly consistent with the principle which assigns the duty of finding facts upon evidence to the jury, and that of pronouncing the law to the court. By the modern practice, courts are constantly called upon, upon motions for new trials, to consider the weight and sufficiency of evidence; and though they do not pronounce a judgment upon their view of the evidence, except when it is specially referred to them, yet they do and must so far decide upon the weight of evidence as to determine whether a verdict shall stand or be set aside, as against the weight of evidence; by which the same evidence is referred to another jury. The grounds upon which this power is exercised have been too often explained to require repetition.

Taking this principle as a guide, we think the rule may be thus stated: where evidence has been improperly received or rejected, and the verdict is found against the party taking the exception, and a motion for a new trial is made on that ground, such motion will not be granted, if the court can see plainly from the whole evidence, that independently of the evidence received or rejected, the evidence in support of the verdict so decidedly preponderates, that a verdict the other way would be set aside as against evidence. Such a rule, we think, will tend to save unnecessary expense of litigation, to subserve the purposes of justice, and will not be inconsistent with strict legal principle. Such also, we think, is the rule recently adopted in the courts of common law, limiting the broader construction formerly put upon the powers of the court in this respect. *Rutzen* v. *Farr*, 4 Adolph. & Ellis, 56. *Wright* v. *Tatham*, 7 Adolph. & Ellis, 330. *Crease* v. *Barrett*, 1 Crompt. Mees. & Rosc. 919. *S. C* 5 Tyrw. 458.

The only remaining question is, whether the evidence in the

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present case, independently of the plaintiff's letters, written after he had knowledge that a tax had been assessed upon him, was so conclusive, that a verdict against him could not have been retained by the defendants.

(The chief justice here recapitulated the evidence, as stated in the report thereof by the judge who tried the case.)

Guiding ourselves by the rules which have been applied to motions for new trials, the court are of opinion, that a verdict against the plaintiff, upon this evidence, finding that he had not changed his residence and ceased to be an inhabitant of Boston, at the time this tax was assessed, would have been so manifestly against the evidence, that on a motion for a new trial, it could not have been supported.

Judgment on the verdict.

David Sears *vs.* City of Boston.

A native inhabitant of Boston, intending to reside in France with his family, departed for that country in June, 1836, and was followed by his family about three months afterwards. His dwellinghouse and furniture were leased for a year, and he hired a house for a year, in Paris. At the time of his departure he intended to return and resume his residence in Boston, but had not fixed on any time for his return. He returned in about sixteen months, and his family in about nine months afterwards. *Held*, that he continued to be an inhabitant of Boston, and that he was rightly taxed there, during his absence, for his person and personal property.

Assumpsit to recover back money paid upon compulsion, in discharge of a tax for the year 1837, assessed on the person and personal property of the plaintiff by the city assessors. The parties submitted the case to the decision of the court upon the following statement of facts:

The plaintiff, on the 1st of June, 1836, was, and for many years prior to that time, had been, an inhabitant of the city of Boston. On that day, he left said city, with the intention of residing, with his family, in Paris, in the kingdom of France. All the members of his family followed him in September of the same year, and his dwellinghouse, with its furniture, was leased for one year.

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The plaintiff, at the time of his departure for France, intended to resume his residence in Boston, but he had not determined, or thought of, the particular time of his return. It was his expectation to be absent three years at least, and to remain, with his family, stationary in Paris, in which city he hired a dwellinghouse for one year. The state of commercial affairs in this country induced the plaintiff to return to Boston in October, 1837, and his family returned in July, 1838. On the 1st of May, 1837, the plaintiff was assessed, by the city assessors, for his poll and personal estate in the taxes laid for that year, and he paid the tax to the city collector, upon compulsion. Prior to the assessment of said tax, viz. on the 29th of March, 1837, the authorized agent of the plaintiff delivered the following notice to the assessors of said city: "The undersigned, as agent of David Sears, and in his behalf, informs you that Mr. Sears with his family removed from this city, and leased his mansion house, nearly a year since. He has ever since continued, and still continues absent with his family. This notice is given to enable you, before the assessment of taxes for the current year, to understand that Mr. Sears will not consider himself chargeable with taxes as an inhabitant of, or resident in, Boston."

It was agreed that judgment should be rendered for the plaintiff, or that he should become nonsuit, according to the opinion of the court, as to his liability to pay said tax.

W. D. Sohier, for the plaintiff.

J. Pickering (City Solicitor), for the defendants.

Shaw, C. J. This action is brought to recover a sum of money paid, under a compulsory process, as a tax upon the poll and personal property of the plaintiff, for the year 1837, whilst he was in fact residing in Paris. The question is, upon the facts agreed, whether he was an inhabitant liable to taxation. By the provisions of the Rev. Sts. c. 2, § 6, clause 7th, the word inhabitant, as used in the statutes, may be construed to mean a resident in any city or town.

Actual residence, that is, personal presence in a place, is one circumstance to determine the domicil, or the fact of being an inhabitant; but it is far from being conclusive. A seaman on a

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long voyage, and a soldier in actual service, may be respectively inhabitants of a place, though not personally present there for years. It depends, therefore, upon many other considerations, besides actual presence. Where an old resident and inhabitant, having a domicil from his birth in a particular place, goes to another place or country, the great question whether he has changed his domicil, or whether he has ceased to be an inhabitant of one place and become an inhabitant of another, will depend mainly upon the question, to be determined from all the circumstances, whether the new residence is temporary or permanent; whether it is occasional, for the purpose of a visit, or of accomplishing a temporary object; or whether it is for the purpose of continued residence and abode, until some new resolution be taken to remove. If the departure from one's fixed and settled abode is for a purpose in its nature temporary, whether it be business or pleasure, accompanied with an intent of returning and resuming the former place of abode as soon as such purpose is accomplished; in general, such a person continues to be an inhabitant at such place of abode, for all purposes of enjoying civil and political privileges, and of being subject to civil duties.

Taking the facts as submitted to the court, in the present case, we are all of opinion that they indicate a casual and temporary departure of the plaintiff from his place of permanent abode, and that he still continued to be an inhabitant of Boston, liable to be taxed for his poll and personal property. Most of the circumstances point to Boston as the fixed place of his abode, and to Paris as a place of temporary residence. Here he was born and educated, and acquired his property. Here was his dwellinghouse; and though leased during his absence, it was with the furniture, and for a very short term, so that his family establishment could be resumed on his return. But the very strong circumstance which characterizes this case is, that at the time of the plaintiff's departure, it was his intention to resume his residence in Boston. It indicates that Paris was a place of temporary and not of permanent abode, and that he did not relinquish his domicil, or cease to be an inhabitant of Bos-

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ton. Had he returned to Boston a few days before a town meeting or an election, we think he would have had a right to attend and vote as an inhabitant, in the same manner as if he had not been absent. He would have been in the same situation, in this respect, as a soldier, or mariner, or other person temporarily absent from his home, for purposes of business or pleasure.

The circumstance of the plaintiff's taking a house in Paris for one year — it not appearing he engaged, or that it was his intention to engage, in any business or occupation abroad — is not sufficient to control the other circumstances tending to show that Paris was a place of a temporary visit, and not of a permanent residence; that he was there as a sojourner, and not as an inhabitant.

Each case of this description depends so much upon its own circumstances, that it is difficult to find authorities for any thing more than a few general positions, which are plain and well understood. We think this case is distinguishable from that of *Thorndike* v. *City of Boston* (*ante*, 242), in this, that in that case, at the time of the departure of the plaintiff from Boston, it was his declared intention not to return and resume his residence This was strengthened by proof of preferences previously and frequently declared in favor of a foreign permanent residence and abode, and by a declared purpose, after taking up a residence at Edinburgh, not to return to Boston. In the present case, there was, at the time of the departure of the plaintiff from Boston, an intention to return and resume his residence in Boston, though at no fixed period, accompanied with circumstances indicating a temporary and not a permanent residence in Paris. The court are therefore of opinion that the plaintiff continued to be an inhabitant of Boston, liable by law to taxation, and that he is not entitled to recover back the money paid as a tax upon his person and personal property.

Plaintiff nonsuit.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF BERKSHIRE, SEPTEMBER TERM 1840. AT LENOX.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE,
HON. SAMUEL PUTNAM,
HON. SAMUEL S. WILDE,
HON. CHARLES A. DEWEY,
} JUSTICES.

LYMAN BROWN *vs.* SETH G. BAILEY.

A clause added to a devise of a fractional part of certain land, that it is "to be taken by the devisee where he shall choose or select, at its just or proportionable value," does not constitute a condition precedent to the vesting of the estate devised; but the devisee, on the death of the devisor, becomes tenant in common, with a right of selection, to be exercised or not, at his will.

Where a first attaching creditor made a levy, by metes and bounds, on the land of a tenant in common, who had the right of taking his share where he should select, and the part thus levied on was afterwards, on a process of partition, assigned to such tenant in severalty, at his request; the levy was held to be valid against all conveyances and attachments subsequent to the first attachment.

WRIT of entry to recover three acres and one hundred and forty rods of land in Sandisfield.

The facts, on which the case was decided, were these:— Richard Chapell died on the 21st of February, 1825, having by his last will devised one fifth of his homestead to his son, Matthew S. Chapell, to be taken where said Matthew should "choose

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or select, at its just or proportionable value, according to its quality," &c. On the 24th of February, 1825, the demandant attached said Matthew's right and interest in said homestead, and having recovered judgment, levied his execution, on the 29th of March, 1828, upon the demanded premises, by metes and bounds. Said premises are much less than one fifth of said Richard's homestead. The residue of said Matthew's right and interest in said homestead was afterwards set off, by metes and bounds, upon executions that issued on judgments recovered against him by his other creditors.

In June, 1828, a petition for partition of the estate of Richard Chapell was preferred by D. Chapell, one of his sons, alleging that the petitioner was entitled to one fifth of said estate, and that the other four fifths belonged to four other sons of said Richard, viz. John, Seth, Richard, and Matthew S. Chapell. At the September term, 1830, of this court, partition of said estate was ordered, and commissioners were appointed to make partition, who were directed first to set off to Matthew S. from the homestead, in such place as he should select, so much as would satisfy his share, pursuant to the terms of his father's will. Said Matthew S. appeared before the commissioners, by his attorney, and they set off and assigned to him, in severalty, his share of said homestead, as selected by his attorney, including the demanded premises, and the other parts of the homestead which had been levied on by his other creditors, as above mentioned. The report of the commissioners' said proceedings was accepted and ordered to be recorded, at the May term 1831.

The tenant claimed possession of the demanded premises under a demise from Hiram Baldwin, who defended this suit. Said Baldwin claimed title, *first*, under a release from Abner Sage, Jr., to whom Matthew S. Chapell, on the 2d of March, 1825, gave a deed purporting to convey all his right in the real estate devised to him by his father; and *secondly*, under a levy of an execution, made on the 26th of July, 1831, upon a judgment against said Matthew S., recovered by T. Phillips, administrator, with the will annexed, of the estate of Richard Cha-

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pell, and a deed of release to said Baldwin, purporting to be made by said Richard's heirs at law.

Jones and *G. J. Tucker*, for the demandant, cited the cases referred to in the opinion of the court, and argued therefrom that the levy was originally valid against the debtor and all persons claiming under him, and that by the partition it became valid against the cotenants.

Bishop and *Rockwell*, for the tenant. The demandant's levy was void, being made before the debtor had selected the part which he would take under the will. Such selection was a condition precedent to the vesting of the estate; or if not a condition precedent, yet it was a right which the demandant could not acquire by attachment, and which the debtor by his deed to Sage, prior to the levy, had transferred with his title to the estate devised

A levy, by metes and bounds, on part of a cotenant's estate, has never yet been held to estop his other creditors. *Smith* v. *Benson*, 9 Verm. 138. [See also *Starr* v. *Leavitt*, 2 Connect. 243.]

Shaw, C. J. The question is upon the validity of the title acquired by the demandant by his attachment, and the levy of his execution upon the premises, as the estate of Matthew S. Chapell. The estate of Chapell was derived under the will of his father, Richard Chapell, giving him an equal share, being one fifth part, of his real estate, "to be taken where he shall choose or select, at its just or proportionable value." These words do not constitute a condition precedent to the vesting of the estate, but a right or privilege superadded to the devise, to be exercised or not, at the will of the devisee, upon partition. Consequently Matthew became entitled as tenant in common, under the devise, upon the decease of his father. Immediately after the decease of the devisor, and before the intervention of any other title or claim, this estate was attached by the demandant, and, if followed up by a valid levy, constituted a good title, eldest in time, and therefore prior in right.

The objection to the demandant's levy is, that it was a levy on a specific portion of the devised estate, by metes and bounds; whereas it should have been levied upon the debtor's undivided

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share in whole or in part. This would undoubtedly have been a valid and fatal objection, had it been made by any of the cotenants before partition, because it would be an encroachment upon their right to have partition of the whole tenement. *Porter* v. *Hill*, 9 Mass. 34. *Bartlet* v. *Harlow*, 12 Mass. 348. *French* v. *Lund*, 1 N. Hamp. 42. But as this rule is adopted for the protection of the rights of the other cotenants, it shall not be extended further than the accomplishment of that object requires; and it is therefore held, that a conveyance of part by metes and bounds, by a cotenant, is not void, but voidable only by the other cotenants. And the same rule applies to a levy on part by metes and bounds, as the estate of a tenant in common, which is in the nature of a statute conveyance. *Varnum* v. *Abbot*, 12 Mass. 474. *Nichols* v. *Smith*, 22 Pick. 316. Such conveyance or levy, therefore, is good against the grantor and all claiming under him. If then the other cotenants release, or if upon a partition, their full shares are set off in other parts of the common estate, and the part conveyed or levied on is assigned to the party whose share has thus been conveyed or levied on by metes and bounds, such partition operates by way of estoppel and release, because no one has any longer a right to contest its validity. *Bartlet* v. *Harlow*, 12 Mass. 354. That is precisely the present case. After the levy, a partition was made, in which the premises levied upon by the demandant were assigned to his debtor, Matthew S. Chapell. This was done by the full consent of the latter, by which the right of choice, given to him by the will, was fully secured to him, and exercised by him.

The case then shows that the estate in common vested in the debtor on the decease of the devisor, and was first well attached by the demandant, as his creditor; that the levy, made in pursuance of the attachment, was voidable only by the other cotenants; that it was never in fact avoided by them, but on the contrary, by the partition, their claims were fully satisfied out of other parts of the estate, and from and after such partition, they were precluded from avoiding or contesting the demandant's title; and that this title relates back to the attachment, and su-

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persedes all subsequent conveyances and attachments, and is therefore valid and indefeasible.

Judgment for the demandant.

COMMONWEALTH *vs.* JESSE SQUIRE, Jun.

An indictment on § 5, *c.* 126, of the Rev. Sts. which alleges that the defendant wilfully, &c. set fire to and burned "a building erected for a dwellinghouse, and not completed or inhabited," sufficiently and properly describes the offence.

If acts, which constitute a misdemeanor only, are alleged, in an indictment, to have been done feloniously, and the defendant is found guilty by the jury, the word "feloniously" may be rejected as surplusage, and the defendant be punished for the misdemeanor.

It is not necessary to aver, in an indictment on § 5, *c.* 126, of the Rev. Sts. for burning a building, that the building alleged to have been burnt was "other than is mentioned" in § 3.

A conviction or acquittal upon an indictment on said § 5, which does not aver that the building, alleged to have been burnt, was "other than is mentioned" in § 3, is a bar to a second indictment on § 3, for the same burning.

THE defendant was convicted in the court of common pleas, on an indictment which alleged that he, at Egremont, in this county, "on the fifth day of October in the year eighteen hundred and thirty-nine, with force and arms, about the hour of twelve o'clock in the night time of the same day, a building of one Philo Upson of said Egremont, there situate, erected by the said Philo Upson, for a dwellinghouse, and not completed or inhabited, feloniously, wilfully, and maliciously, did set fire to, and the same building, so erected for a dwellinghouse, then and there, by the setting and kindling of such fire, did feloniously, wilfully, and maliciously, burn and consume, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided."

The case was brought into this court upon exceptions to an order of *Cummins*, J. overruling a motion, filed by the defendant, in arrest of judgment.

L. Church, of Connecticut, for the defendant.

Austin, (Attorney General,) for the Commonwealth.

DEWEY, J. The defendant, having been found guilty by the

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jury of the charge contained in this indictment, now interposes a motion in arrest of judgment, and alleges that no crime, cognizable by law, is therein duly set forth and charged, and that the court have, therefore, no authority to enter judgment and award sentence against him.

Various objections are taken to the sufficiency of this indictment.

1. It is contended that the indictment is bad for repugnancy apparent on its face, inasmuch as it charges, as a crime, the burning of a building, which building is described as one not then completed. The ground of the objection is, that a structure cannot be considered a building while it is yet incomplete and unfinished in any respect. Looking at the objects of the statute, and its provisions, we are fully satisfied that the term *building*, as used in the statute, does not necessarily import a structure so far advanced as to be in every respect finished and perfect for the purpose for which it is designed eventually to be used. If this were so, then the burning of a structure, designed for a dwellinghouse, at any period before the last door was hung, would not be punishable. We cannot adopt a construction of the statute, which would leave open so wide a door of escape from its penalties.

It was argued that if the description of the building, as found in this indictment, be sufficient, a party might be convicted under the statute and be subjected to its severe penalties, who had been guilty of no other offence than that of burning a single post or some small parcel of timber which was used as the mere commencement of a building. The obvious answer to this suggestion is, that the question whether the state of the structure, and its progress towards completion, be such as to constitute it a building, is a question of fact, to be submitted to the jury, under proper instructions from the court. After a general verdict of guilty, and no exceptions taken for misdirection by the court in matter of law, we are to assume that it was found by the jury that the structure set on fire was properly denominated a building, and was not merely the materials prepared for a building. See *The State* v. *Temple*, 3 Fairf. 220. In the case, which

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was cited, of *Elsmore* v. *The Hundred of St. Briavells*, 8 Barn. & Cres. 461, the decision turned upon the construction of the words, "house, outhouse," &c. in *St.* 9 Geo. 1; a building, intended for a dwellinghouse, but being in an unfinished state, and never having been inhabited, being held not to be a "house," &c. within the meaning of that statute.

This first exception to the indictment cannot prevail.

2. It is then objected, that though the facts set forth in this indictment constitute only a misdemeanor, yet the offence is in form charged as a felony. It is so charged, it is said, because the acts imputed to the defendant are, in the indictment, alleged to have been done feloniously. Does the use of this form of allegation necessarily, and in all cases, indicate a charge of a felony? We think not. The nature of the accusation is to be determined by the acts charged to have been done, as well as by the technical terms introduced into the formal parts of the indictment. It is true that there are certain technical terms necessary to be used in an indictment for a felony; and no facts charged would constitute a proper indictment for a felony unless they were alleged to have been done feloniously. The combined allegations of the necessary acts, and of the felonious character of those acts, constitute the proper charge of felony. But the application of the term "feloniously," in an indictment, to acts constituting no higher offence than a misdemeanor, does not make it a charge of felony. The term "feloniously," in such case, is improperly introduced into the indictment, and can have no effect, but must be rejected as surplusage. We understand the rule, in such cases, to be this:—Where the matter, alleged to be repugnant, does not enter into the substance of the offence, and the indictment would be good without it, it may be rejected as surplusage, and does not vitiate the whole indictment. Thus, in 1 Chit. Crim. Law, 237, it is said, if an act be charged to have been done with a felonious intent to commit a crime, and it appears upon the face of the indictment, by the facts charged, that the crime, though perpetrated, would not have amounted to a felony, the word felonious, being repugnant to the legal import of the offence charged, must be rejected as surplusage.

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The same principle is stated in 2 East C. L. 1029, upon the authority of a decision by Lord *Mansfield*. The same rule applies to the use of the terms "knowingly," or "the defendant, well knowing," whenever they are introduced into an indictment, although alleged as an ingredient in the imputed crime. If introduced where the knowledge alleged is unnecessary to be shown by proof, in order to constitute the crime, these allegations may always be rejected as surplusage. 1 Chit. Crim. Law, 241. So where an offence is charged in an indictment as *contra formam statuti*, although no statute offence is described, yet if the facts set forth constitute an offence at common law, the defendant may be found guilty, and sentenced as for a common law offence. *Commonwealth* v. *Hoxey*, 16 Mass. 385. Nor is it necessary that an indictment under a statute should indicate upon which of several sections of the same statute it is predicated. It is enough that the facts alleged show an offence, and bring the case within the provisions of some statute making it punishable. *Commonwealth* v. *Griffin*, 21 Pick. 523.

In looking at the matter practically, as it regards the accused, we can perceive no possible injury that can result to a party, charged with an offence, from the introduction of the word "feloniously" in connexion with a charge of a misdemeanor. The case is to be tried, as to the guilt of the party, in reference to the facts alleged against him. If the perpetration of the acts, in the manner charged, be proved, and those acts do constitute a felony, the felonious character of the act is established; and if they amount only to a misdemeanor, assuming the acts to be proved, they are not committed feloniously, because the acts themselves do not constitute a felony.

It is urged by the counsel for the defendant, that the decision of this court, in *Commonwealth* v. *Newell*, 7 Mass. 245, is contrary to the views we have now presented. So far as that case goes to establish the position, that on the trial of one indicted for a felony, he could not be convicted of a misdemeanor, it was clearly conformable to our then existing *St.* 1805, *c.* 88, which has been, however, since repealed by Rev. Sts. *c.* 137, § 11, and where direct authority is given to the jury to find the party

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guilty of part of the offence charged in the indictment. We apprehend that the further opinion of the court, that if the indictment does not contain a sufficient description of a felony, it cannot be supported as an indictment for a misdemeanor, cannot be sustained. It was supposed by the court, that the peculiar provision of *St.* 1805, *c.* 88, restraining the conviction of part of an indictment for felony to those cases where the part, of which the defendant was found guilty, amounted to a felony, had given a statute construction upon this question. By the statute of 1784, *c.* 66, § 11, upon the charge, by indictment, of any crime, felony or misdemeanor, the jury were authorized to find the prisoner guilty of so much thereof as should substantially amount to a crime of a lower nature; and the court were to punish him for the crime of which he was found guilty. This statute remained in force until the enactment of *St.* 1805, above cited, and during its existence, under an indictment for felony, the party might have been convicted of a misdemeanor. But the statute of 1805, in terms, changed the law; and with this enactment, of course, the practice in criminal trials was changed. That statute has now been repealed by Rev. Sts. *c.* 137, § 11, and on an indictment for felony, a person may now be acquitted of part of the offence charged, and convicted of the residue thereof, though it do not amount to a felony.

We are, therefore, brought to the consideration of this question, under this change in our statute laws, which presents the inquiry in a somewhat different aspect; and we feel ourselves fully warranted in adopting what seems to us the more sound common law rule, that an indictment, defective in not charging facts necessary to constitute a felony, may yet be sufficient to authorize the jury to convict, and the court to award sentence, as for a misdemeanor. The court are of opinion, that upon this indictment judgment may properly be rendered as upon an indictment for a misdemeanor, if the facts therein set forth constitute a misdemeanor under the provisions of the Rev. Sts. *c* 126, § 5.

3. It is then further objected, that this indictment is defective in not setting forth all the facts necessary to constitute the offence

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punishable by the Rev. Sts. c. 126, § 5. That section is in these words: "Every person who shall wilfully and maliciously burn, either in the night or in the daytime, any banking house, store, manufactory, mill, barn, stable, ship, office, outhouse, or other building whatsoever, of another, other than is mentioned in the third section, shall be punished by imprisonment," &c. The form of the objection is, that inasmuch as the cases, provided for by this section, are cases "other than those mentioned in the third section," the act creating this offence contains certain exceptions; and that if exceptions are found in the enacting clause of an act creating the offence, it is necessary, in the indictment, to negative such exceptions, that the crime charged may correspond with the statute offence.

While we fully accede to the correctness of the general principle here contended for, as to the necessity of negativing exceptions in an enacting clause, which declares certain acts to be criminal offences, but contains a proviso, or exception, limiting the application of the statute, or making certain things mentioned in the proviso or exception an essential ingredient of the crime to be punished; we doubt as to the application of any such principle to the section of the statute under consideration. This is not like the ordinary case of a statute declaring certain acts to be a crime under certain qualifications contained in a proviso or exception. Upon comparing the third and fifth sections of the statute, it is obvious that the exception here is rather to be considered in the light of a graduation of punishments to different degrees of the same species of offence; the third section providing, as it does, that all cases of wilful and malicious burning, therein described, shall be punished by imprisonment in the state prison for life, and the fifth section, after specifying certain cases, then providing generally for the punishment for burning all other buildings, not mentioned in the third section. It is only another example of the same kind of graduation of punishments, that is provided in cases of larceny of the various grades. The indictment, with sufficient distinctness, sets forth the character of the offence, as to its aggravation, and thus indicates the punishment to be awarded. It does not describe a case falling within

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the third section, but it does state one exactly corresponding with the cases provided for in the fifth section; and this determines the extent of the punishment. It seems to us, therefore, that the indictment is not objectionable on the ground that no criminal offence is here charged. It is not like those cases where every averment contained in the indictment may be true, and yet the defendant be guilty of no legal offence.

4. The only remaining question to be considered is, whether the offence is so charged, in this indictment, that after a conviction or acquittal thereon, it will protect the defendant against a second indictment for the same act, supposing the facts would have warranted, originally, an indictment for the offence of the higher degree embraced in the third section. The difficulty, here supposed, also arises from not stating in the indictment the exception contained in the fifth section.

It does not seem to us that the security of the party against being again charged for the same act necessarily requires the form of the indictment to be such as is suggested by the defendant's counsel. Upon this point also, some aid may be derived from considering the course of proceeding in prosecutions for larcenies. Larcenies, by our statute, are of various grades, and are punished with greater or less severity, according to the aggravation of the offence; and these different grades of offences are punished under the provisions contained in different and distinct sections of the statute. But we know very well that in larcenies, indictments are often found, charging the inferior grade of crimes, and omitting the circumstances of aggravation, when all the facts existing in the case would, if disclosed to the jury, bring the case within the higher grade of larcenies. Would it be a defence to such indictment, on the trial before the petit jury, that the defendant had committed the offence charged, but with certain aggravating circumstances not charged? It seems to us not, and that when the offence charged in the indictment, and the offence actually committed, are both merely larcenies, the greater offence includes the less, and evidence, proving the greater offence, will support an indictment for the smaller offence. Such being the case, it would seem neces-

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sarily to follow, that the conviction or acquittal of a party, thus charged with the minor larceny, must be a bar to a subsequent indictment charging the same larceny with aggravating circumstances. The same rule would seem properly to apply to the different gradations of offences of maliciously burning buildings, as provided for in the third and fifth sections of the Rev. Sts. c. 126, which is also the same statute in which there are created four distinct grades of larcenies, with different punishments annexed to them. The offences, made punishable by the third and fifth sections, are both only misdemeanors, and the same court have jurisdiction of each. There would be but one criminal act in the malicious burning of a building, whether that building alone was consumed, or it occasioned the burning of any building described in the third section. Taking the case under these limitations, we think if the government proceed by an indictment for the smaller offence, and on trial thereof there be a judgment of conviction or acquittal, such judgment would be a legal bar to a second indictment charging the same offence with aggravation. *The State* v. *Cooper*, 1 Green, 362.

Upon the whole matter, we are, therefore, brought to the conclusion, that this indictment does set forth the burning of such a building as is described in the statute; that as the facts stated in the indictment constitute a misdemeanor and not a felony, the offence is well charged, in the indictment, as a misdemeanor, if the word feloniously be rejected as surplusage, as we think it may be; that the indictment is sufficiently particular in its form of charging the offence to be punished; and, finally, that a conviction or acquittal on this indictment would be a good bar to a second indictment for the same act, alleging it with the aggravating circumstances described in the third section of the statute. The result, therefore, is, that the motion in arrest of judgment must be overruled, and the punishment awarded against the defendant, which is prescribed by law in such cases.

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JOSIAH ARNOLD & another *vs.* NELSON H. STEVENS.

Where one of several tenants in common of the right to dig and remove ore from another's land enters and digs, and removes ore therefrom, the owner of the land cannot maintain trespass against him on the ground that he did not first give notice to his co tenants, according to the provision of the Rev. Sts. *c.* 105, § 7, of his intention to enter, &c.

TRESPASS for entering the plaintiffs' close and digging and carrying away ore. At the trial before *Putnam*, J. it was proved or admitted that the plaintiffs were the owners in fee of the *locus in quo*, and that the defendant entered, and dug and removed ore therefrom. The defendant then proved that he and divers others, in common with him, had a right, by grant or devise, to enter upon said close, and dig and remove ore. But he did not prove, or attempt to prove, that before the entry, &c. complained of in this suit, he gave notice to those who had the right in common with him, of his intention to enter, &c. or procure their consent to his entry, &c. A verdict was returned for the plaintiffs, subject to the opinion of the court whether it could be retained on these facts.

Byington, for the plaintiffs, argued that they were not subject to the separate entry of each of the owners of the right to the ore, but only to such entry, &c. as by the Rev. Sts. *c.* 105, § 7, is lawful as between the cotenants of that right; and that as one cotenant cannot lawfully enter, &c. without giving written notice to the others of his intention so to do, the plaintiffs may maintain an action against him, if he enter without such notice.

Bishop, for the defendant.

WILDE, J. The plaintiffs cannot retain their verdict. The Rev. Sts. *c.* 105, §§ 7 & 8, concerning tenants in common, &c. have no bearing on this case, being made solely for the protection of one cotenant against the encroachments of another. If the plaintiffs were themselves cotenants with the defendant, they could not maintain this common law action, but must have proceeded against him on § 8, for the penalty imposed by § 7.

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The defendant proved his right, as against the plaintiffs, to do the acts complained of by them, and he was not bound to go any further.

Verdict set aside, and plaintiffs nonsuit.

JOHN SPERRY *vs.* REUBEN WILCOX.

In an action of slander, the defendant pleaded the general issue, and gave notice that he should justify speaking the words by proving them to be true. On the trial, he gave evidence tending to prove the truth of the words. The judge instructed the jury that if they were satisfied that the defendant made the charge against the plaintiff, which was alleged in the declaration, they should find a verdict for the plaintiff, unless, upon the whole evidence, they were satisfied that the charge was true; that the burden of proof was on the defendant to establish that fact; and that if the jury doubted as to that fact, they should find for the plaintiff. *Held*, that this instruction was correct.

In the trial of an action of slander for charging the plaintiff with stealing a deed, made to him by the defendant, of a certain farm, the defendant, in order to prove the truth of the charge, gave evidence (*inter alia*) that the plaintiff, on being charged by the defendant with stealing the deed, took the deed from the register's office, and reconveyed the farm to the defendant; and that there was a recital, in the deed of reconveyance, respecting "the improper delivery," &c. of the former deed. *Held*, that the plaintiff was rightly permitted to prove, by way of rebutting the inference which might be drawn from the evidence aforesaid, that one of his friends advised him to make the deed of reconveyance, for the purpose of avoiding the expense of a lawsuit.

THIS was an action of slander, for charging the plaintiff with stealing a deed. The general issue was pleaded and notice given that the defendant would justify speaking the words, by proving the truth of the charge.

At the trial before *Wilde*, J. the defendant gave evidence that on the 5th of April, 1837, a negotiation was pending between him and the plaintiff, and the plaintiff's brother, Sylvester Sperry, for the sale to them of the defendant's farm and certain personal property, for a sum exceeding $5000; that all but $3000 of said sum was to be paid on delivery of the deed by the defendant, and $3000 to be secured by their note, and a mortgage on said farm: That the plaintiff and defendant procured a deed and a mortgage to be drawn by an attorney; that the defendant executed and acknowledged the deed, and the plaintiff executed

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and acknowledged the mortgage, and each party took his own papers, and left the attorney's office, with an understanding that when the plaintiff and his said brother should procure and pay to the defendant the consideration money, except the $3000, the defendant should deliver his deed (which was drawn with a clause for relinquishment of dower by his wife,) and should receive the mortgage (being first executed by the plaintiff's said brother) and a note of the plaintiff and his brother for said $3000: That on the 19th of April, the plaintiff carried the deed of the farm to the registry of deeds, and that it was recorded: That on the 4th of May the defendant charged the plaintiff with stealing said deed, and that on the same day, the defendant went to the registry, obtained the deed, and with his brother reconveyed the farm to the defendant.

In this deed of reconveyance, there were recitals of the former transactions, and mention was made of the "improper delivery" of the former deed. From inspection of that deed, it appeared that the defendant's wife never executed it.

The plaintiff then introduced said Sylvester Sperry, who testified, that on the 19th of April, the defendant delivered his deed to the plaintiff, in the defendant's house, (no witnesses except the parties being present) and received the note of the plaintiff and the witness, and their mortgage for $3000, and also their other note for $2437, for his deed to the plaintiff, and for the balance of the consideration money for said farm and personal property.

The defendant then introduced a witness, who testified that said Sylvester Sperry, in the first week in May, 1837, a day or two before the reconveyance by him and the plaintiff to the defendant, as above stated, informed the witness that he and the plaintiff expected the money, in a few days, to pay for the farm (except $3000) — that the papers were then drawn, and would be exchanged, when they should so get and pay the money.

The plaintiff was permitted to prove that after the defendant had charged him with taking the deed feloniously, and had ordered him to quit the farm, the plaintiff's father advised him to

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give up the bargain and to reconvey the property, as a lawsuit would be expensive and he would not be able to carry it on.

On this evidence, the jury were instructed, that if they should be satisfied that the defendant charged the plaintiff with stealing, as alleged in the declaration, they should find for the plaintiff, unless upon the whole evidence, they should be satisfied that he took the deed from the defendant feloniously: That the burden of proof was on the defendant to establish that fact; and that if they doubted whether the plaintiff took the deed feloniously, or that it was delivered to him by the defendant, as S. Sperry testified, the plaintiff would be entitled to a verdict.

A verdict was returned for the plaintiff. The defendant excepted to said instructions; and if they were wrong, or if the evidence for the plaintiff, of his father's advice, was inadmissible, the verdict to be set aside and a new trial granted; other wise, judgment to be rendered on the verdict.

Sumner, for the defendant.

Jones, for the plaintiff.

SHAW, C. J. The court are of opinion that the direction to the jury was correct, and could not have been different. All that the plaintiff had to do, in the first instance, was to prove the speaking of the slanderous words of and concerning the plaintiff. This was first to be considered by the jury. If the proof did not establish it, there was an end of the case, and the jury had no need to consider the justification offered by the defendant, or the proof offered to support it. But the words being actionable by themselves, if the speaking were proved, the plaintiff would be entitled to a verdict, unless the defendant should prove the truth of the fact charged. He assumes to prove this affirmatively, and to the satisfaction of the jury. It follows, as a necessary consequence, that if the whole evidence leaves this in doubt, the justification is not made out.

The course, adopted by the defendant to sustain this defence, is this: He goes into the evidence to show a *primâ facie* case of felonious taking, and then asks the court to instruct the jury that the burden is upon the plaintiff to rebut that evidence. We think this is founded on a common misapprehension of the law

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on the subject of burden of proof. Suppose the defendant had brought the strongest evidence of an actual felonious taking of the deed ; such as the plaintiff's confession. The plaintiff might thereupon show that the witnesses were not worthy of credit, and that there had been a conspiracy to swear falsely, &c. The question would still be a question for the jury, depending upon the weight of the whole evidence, whether the defendant had proved, to the satisfaction of the jury, the fact that the deed was feloniously taken. If so, he has sustained the burden of proof, established his justification, and maintained his defence. But if, on all the evidence, this is left in doubt, the defence, on the ground of justification, fails. The question, whether *primâ facie* evidence is overbalanced by the rebutting proof, is very different from the question who has the burden of proof. The former is solely for the jury, upon the whole evidence. This point may be well illustrated by pleading. Suppose the truth were pleaded in justification, and no other plea : the issue would be upon the truth of the fact, and the burden of proof upon the defendant to maintain his plea. Of course, unless the jury were satisfied, on the whole evidence, of the truth of the fact pleaded, the issue must be found against the defendant.

In regard to the other point, the evidence objected to was that the plaintiff was advised by his father to give up the bargain and reconvey the estate to the defendant. The defendant relied upon certain recitals in the deed of reconveyance, from which it might be inferred that he admitted that the deed had been improperly obtained, and that the same inference might be drawn from the fact itself of the reconveyance. We think it was competent for the plaintiff to rebut those inferences, by showing that in making the reconveyance he acted on a different motive ; and the advice of his father, though a slight circumstance and not of much importance, was competent to prove such motive.

Judgment on the verdict.

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GOVERNEUR KEMBLE *vs.* EZRA DRESSER.

A. and B., tenants in common of land, sold the wood growing thereon, with a proviso that it should be taken from the land within two years. B. then conveyed his interest in the land to A. The purchaser of the wood transferred his right thereto to C., who had no notice of the proviso as to the time of taking it away. C. cut the wood, but did not remove it within two years. *Held*, that the property in the wood reverted to A., and that C. could not recover of him pay therefor, nor pay for cutting it.

ASSUMPSIT to recover pay for 353¾ cords of wood, and also pay for cutting the same.

The facts, on which the parties submitted the case to the court, were these: On the 6th of September, 1836, the defendant and S. A. Winslow owned certain land, and by their written agreement, of that date, sold to C. Reynolds the wood and timber growing thereon. On the same day, said Winslow conveyed all his right in said land to the defendant. The said agreement with Reynolds contained this condition: "Provided, however, the said Reynolds (his executors, administrators or assigns) is to get off and remove from said lot said wood and timber, within two years from the date hereof, and not afterwards." Said Reynolds further agreed, that if he did not get off said wood and timber within said term of two years, the defendant should have it, but this fact was not known by the plaintiff.

Said Reynolds afterwards cut and took away a part of the wood, and sold the remainder, by a parol agreement, to the plaintiff, who cut the same, but did not remove it, before the expiration of said two years. Before this action was commenced, the defendant took five cords of the wood so cut by the plaintiff, and burned it at his own house; and he, at the same time, forbade the plaintiff's taking the remainder.

Jones, for the defendant. The proviso, in the agreement with Reynolds, was a condition which, not being performed, defeated the sale; Shep. Touch. 131; Co. Lit. 203 *b*; and the wood reverted to the owner of the land. *Lawrence* v. *Gifford*, 17 Pick. 366. If the defendant had not a right to take away the wood, nor to forbid the plaintiff to take it away, he was a tort-

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feasor in so doing, and not answerable in assumpsit. *Jones* v. *Hoar*, 5 Pick. 285.

Sumner, for the plaintiff, denied that it was the intention of the parties to the agreement of sale that the wood, *which was paid for*, should revert to the vendor, if not taken off within the time mentioned. The neglect so to take it off was a breach of contract, perhaps, for which damages might be recovered. In *Lawrence* v. *Gifford*, the parties expressly agreed that the property should revert, and the condition was known to the plaintiff.

If assumpsit will not lie, the form of action may be altered. *St.* 1836, *c.* 273, § 3.

PUTNAM, J. We all think that the plaintiff cannot recover, either for the price or value of the wood, or for the labor of cutting it. On the facts, which the parties have submitted to us, the right of Reynolds to the wood depended on his removing it from the land within two years. The land belonged to the defendant, with the appurtenances, subject to the right of Reynolds, his administrators and assigns. The interests of the parties were adverse. It was for Reynolds's interest to get as much wood from the land as he could within the time, and the defendant was benefited according to the quantity of wood remaining after the term of two years.

It makes no difference, in this case, that the plaintiff did not know, when he received a transfer of Reynolds's right, the condition on which that right depended. The plaintiff acquired only such right as his assignor had, and must stand in precisely the same situation, in regard to the defendant, in which his assignor had stood. Unfortunately for the plaintiff, though he cut the wood within the two years, he did not remove it within that time, and the right to the wood reverted to the defendant. He had it absolutely, as appurtenant to his freehold, just as if no agreement for the sale of it had ever been made. The plaintiff, therefore, cannot recover for the wood, or the price of it, because he did not perfect a title to it.

It is contended for the plaintiff, that as he has performed much labor upon the property which has reverted to the defendant, he should have a reasonable compensation. But there has

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been no contract between the parties, express or implied, touching the wood. The plaintiff did the work, on his own account, and not at the request or for the benefit of the defendant. Indeed, it may be that the trees would, if standing, be worth more to the defendant than the wood.

Plaintiff nonsuit.

HANNAH FOOT *vs.* CALVIN MARTIN & another, Administrators.

Where the maker of a promissory note is sued thereon by the payee, and has a demand against a third person, which the payee was not originally bound to pay, such demand cannot be set off against the note in consequence of the payee's having made a valid engagement that the maker shall receive such demand out of the payee's estate after his decease.

ASSUMPSIT on two promissory notes given by Henry C. Brown, the defendants' intestate. The defendants, at this term, moved for leave to file, in set-off, an account for board, clothing and schooling of Abby B. Sutton and Edward A. Sutton. To sustain this motion, the defendants exhibited a sealed instrument, executed by the plaintiff, in August, 1833, reciting that Brown, the intestate had, from time to time, advanced money for the education and support of her grandchildren, Abby B. and Edward A. Sutton, and authorizing and empowering said Brown, or his heirs, executors or administrators, to have and receive out of her estate, after her decease, all such sums as he had already advanced, and also all other sums for their support, for all which she desired that he should be amply paid. The plaintiff, by said instrument, also authorized and directed the intestate to advance $1200 to Abby B. Sutton, when she should be married, and stipulated that the said sum should be indorsed on, or deducted from, notes which the plaintiff held against him.

Rockwell, for the defendants.

D. N. Dewey and *E. H. Kellogg*, for the plaintiff.

SHAW, C. J. Without considering the objection, that this motion is not seasonably made, the court are of opinion that the

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proposed set-off, if filed, could not be maintained. It does not appear that Mrs. Foot was debtor for the expenses incurred in support of her grandchildren. She entered into a special engagement that those expenses should be paid out of her estate, after her decease; but this creates no obligation to pay them during her life. Besides, the stipulation that, in case Mr. Brown should advance $1200, on a particular contingency, to one of them, it should be deducted out of notes held by the plaintiff against him, carries with it a strong implication, that the other advances made by him were not to be so deducted. To allow then, by way of set-off, a deduction from those notes, would be manifestly against the intentions of the parties.

Motion overruled.

ELI ENSIGN *vs.* WYLLIS BARTHOLOMEW.

A. and B. each brought an action against C. to try the same question of title to an undivided part of a tract of land. A.'s action was continued, by agreement of the parties thereto, to abide the decision in B.'s action, in which C. afterwards obtained a verdict, and recovered judgment for costs against B. Thereupon A. submitted to a nonsuit in his action against C. and C. had judgment for costs. *Held*, that this latter judgment was not a bar to a subsequent action by A. for the same cause.

WRIT of entry to recover an undivided third part of a tract of land. The facts on which the question, raised in the case, was submitted for decision, are set forth in the opinion of the court.

Byington, for the demandant.

E. H. Kellogg, for the tenant.

SHAW, C. J. It appears that in a former suit between these parties, on the same title, being a real action for an undivided part of a tract of land, the parties agreed, in the court of common pleas, that the action should abide the decision of another then pending in that court, involving the same question, between one Owen and the present defendant, then intended to be tried. It further appears that the case of Owen against the present defendant was brought into this court, and that there was a verdict

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and judgment for the defendant. After this decision, the case between the present parties, which was still pending in the court of common pleas, was disposed of by a nonsuit, and the defendant had judgment for his costs. The defendant now insists, that this agreement, and the judgment of nonsuit, subsequently entered, ought to be deemed a bar to another action for the same cause, because the verdict and judgment, in the case referred to, had the effect and operation of barring another suit for the same cause. The question is not now, whether under that agreement, the court of common pleas would have been authorized to enter another and different judgment than that of nonsuit, but what is the effect of that judgment, taken in connexion with the agreement.

Whatever may be the authority of counsel and attorneys over causes, for the conduct and management of which they are retained, and whatever may be the effect of an agreement, made for the trial and disposition of causes, as for a default, nonsuit, discontinuance, reference, verdict, &c. with all such limitations and conditions, as they may think fit to annex to them; in general they are to be considered not as collateral and independent contracts to be enforced elsewhere, but as agreements made in the cause, and to be carried into effect specifically, by the court, in the disposal of the cause, pursuant to such agreement. They constitute a proper basis, upon which the court will act in the conduct or final disposition of the cause. They proceed on the maxim, *volenti non fit injuria*. What the authorized representatives of the parties, charged with the care and protection of their respective rights in the management of their causes, assent to, cannot injure them. But such agreements are considered as under the control of the court, and if the court perceive that they were made through mistake or surprise, or that they will have an injurious effect upon the rights of either party, not foreseen or intended, the court will discharge them, and remit the parties to their legal rights. *Haskell* v. *Whitney*, 12 Mass. 47.

But in general, when the cause is terminated by a judgment, or final disposition of the action, the agreement has had its full operation, and the rights of the parties will be determined by

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the judgment of the court as recorded, and not by the steps which led to it.

Further, as it is competent for the parties to make such agreements, it is also competent for them to modify or waive them. And if a cause is disposed of, in a manner different from that stipulated in such interlocutory agreement, and as a judgment after appearance cannot be rendered but by the express consent, or tacit acquiescence of the parties; when a final judgment is rendered, different from that expressed in such agreement, it affords a conclusive presumption, that the agreement was waived or modified. Taking these views to be correct, the court are of opinion, that the judgment in the former case is no bar to the present.

A judgment of nonsuit is certainly no bar to another action for the same cause. And the court are of opinion that in the present case no additional force or legal effect can be given to that judgment, in consequence of the agreement to abide another case. By the nonsuit entered in the former action between these parties, after the verdict and judgment in the case which it was agreed to abide, we must presume either that such disposition of the cause was the one originally contemplated and understood by the agreement, or that the agreement itself had been waived or modified by the parties; and in either case, it is to have the legal effect of a judgment of nonsuit, and no more. This cause, therefore, is to stand for trial, unaffected by the proceedings in the former case.

ITHAMAR H. SMITH *vs.* GEORGE BARTHOLOMEW & another.

A promise, by the holder of a joint and several note, to one of the makers who had made part payment thereof, that he would look to the other maker for payment of what remained due thereon, is without consideration, and furnishes no defence to an action against the maker, to whom such promise was made, to recover the remainder of the note.

ASSUMPSIT upon a promissory note dated June 18, 1831, by which the defendants, George and Harry Bartholomew, jointly

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and severally promised to pay Wyllis Bartholomew, or bearer, $40 by the 1st of April then next, with interest.

George Bartholomew was defaulted, and the action was defended by Harry Bartholomew.

At the trial, in the court of common pleas, before *Warren*, J. it was proved or admitted that on the 26th of June, 1837, said note was in the hands of the payee, and that he, on that day, executed and delivered to said Harry Bartholomew the following instrument: "This may certify that I, the subscriber, hold a note of the sum of forty dollars against Harry Bartholomew and George Bartholomew, which is indorsed down to twenty-nine dollars. What is paid on said note has been paid by said Harry, and I agree to look to George Bartholomew for what there is now due on the said note, with the assistance of Harry to state how the business has been transacted since the note has been given. Wyllis Bartholomew."

It was also proved or admitted that the note referred to in said instrument was the note now in suit.

The judge instructed the jury that these facts did not constitute a sufficient defence to the action, and a verdict was returned for the plaintiff. To this instruction the defendant alleged exceptions which were allowed by the judge

Byington, for H. Bartholomew.

Sumner, for the plaintiff.

WILDE, J. We do not think it necessary to decide, in the present case, whether the agreement on which the defendant, Harry Bartholomew relies, would, if valid and on a good consideration, be a legal defence, as we are of opinion that it is not valid and obligatory, not being sustained by a sufficient consideration.

It appears by the agreement that a part of the note, but not a moiety, had been paid before the agreement, by the said Harry. But this was only part payment of his own debt, and is not a sufficient consideration to support a promise to discharge him from the payment of the residue. The consideration, if any, was past, and the case of *Gleason* v. *Dyke*, 22 Pick. 390, cited by the defendant's counsel, is not applicable. In that case, the

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plaintiff had paid the defendant's note, though not at his request: But he afterwards ratified the payment, and promised to pay the amount; and it was held that the ratification was equivalent to a previous request. And on another ground the promise in that case was held to be binding. In the present case, the consideration, whether past or present, is insufficient to sustain the agreement. No meritorious consideration requiring a recompense appears; and if the payment by the defendant, Harry, had been made at the time of the promise, the consideration would not be sufficient to support it. In the case of *Steinman* v. *Magnus*, 11 East, 390, there was an agreement, by the plaintiff and other creditors of the defendant, to compound their claims against him, the defendant to give security for half the composition, the plaintiff agreeing to receive the same in full satisfaction of his demand. This agreement was held binding on the plaintiff, on the ground that the plaintiff's suing the debtor, after having received the composition, was a fraud upon the surety and other creditors. This case, therefore, was distinguished from *Fitch* v. *Sutton*, 5 East, 230; *Heathcote* v. *Crookshanks*, 2 T. R. 24, and other cases, in which it had been decided that an agreement, not being by deed, to accept a less in satisfaction of a greater sum than was due, was not binding. In *Parker* v. *Baylis*, 2 Bos. & Pul. 73, it was decided that the laying out of money by the plaintiff, merely for his own benefit, though done at the defendant's request, cannot be a consideration to support a promise by the defendant; and the same principle is applicable to the present case.

The payment of a debt by a debtor, the same being due and payable, is not a sufficient consideration to support a promise. It is not considered as any detriment to the debtor, or benefit to the creditor. The one pays only what he was bound to pay, and the other receives no more than his just debt. Such a consideration is merely nominal and insignificant, and is deemed in law no consideration at all. Whatever, therefore, may be the construction of the plaintiff's agreement with Harry Bartholomew, it cannot discharge him from his liability in this action.

Judgment of the court of common pleas affirmed.

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Stephen Stevens *vs.* Polly Ann Stevens

Same *vs.* Same.

Pendency of a libel, under the Rev. Sts. *c.* 76, § 6, for a divorce from bed and board for desertion, cannot be well pleaded in abatement of a libel for a divorce from the bond of matrimony for desertion, under the statute of 1838, *c.* 126.

Where a husband voluntarily discontinues a libel against his wife for a divorce, she is entitled to a judgment and execution against him for costs.

Libels for divorce. The first was filed on the 8th of May 1838, and prayed for a divorce from bed and board, alleging an utter desertion by the respondent. While that libel was pending, to wit, in December, 1839, the second was presented in the county of Suffolk, and an order of notice thereon was passed, returnable at the May term 1840, in this county. This libel prayed for a divorce from the bond of matrimony for the wilful and utter desertion of the respondent for five consecutive years without the consent of the libellant. The respondent, at said May term, pleaded the pendency of the first libel in abatement of the second, and the libellant demurred to the plea. He afterwards discontinued his first libel, and the respondent thereupon moved for costs.

Barnard and ***Sumner***, for the libellant.

Rockwell, for the respondent.

Shaw, C. J. Here is a formal plea in abatement to a libel for divorce *a vinculo* for desertion, filed during the pendency of a former libel for a divorce *a mensa* for the same cause. Whether a formal plea in abatement is proper or not, when the proceeding is by libel, we have not stopped to consider. It is a rule of justice, applicable to all legal proceedings, that no one shall be twice vexed for the same cause. The question then is, whether it is for the same cause.

By a statute, which took effect after the filing of the first libel, and before the second, a party might obtain a divorce from the bond of matrimony for desertion; whereas, as the law stood before, he could only obtain a divorce *a mensa* for that cause. Here then was a new, distinct, substantive right,

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not before existing. This was the right sought to be obtained by the second libel, and could not be obtained by the first. Had the first been amended so as to alter the prayer for judgment, still it would appear that at the time of filing the libel, to which the judgment must refer, no such right existed. The reason why a second suit cannot be commenced for the same cause, pending a former, is, that it is unnecessary, inasmuch as the party prosecuting may have the same remedy, under the first, as he could obtain by prosecuting another. In applying this test, it is apparent, that he could not obtain a decree for the same right under the first, which he seeks in this; that is, a divorce *a vinculo*. The facts are the same, and the parties are the same; but the right and the object of the prosecution are wholly distinct. The court are therefore of opinion that the plea cannot prevail.

In the former suit, the libellant having voluntarily discontinued, the respondent, the wife, moves for costs. We take it for granted, that, as a general rule, the court have authority to give costs to the prevailing party. But the ground taken is, that a judgment in favor of the wife may be defeated by the husband. But we think this would be extending the common law rule of the identity of interest of husband and wife beyond the reasons on which it is founded. In general, husband and wife cannot be adversary parties, in a suit at common law. But when the law allows a suit for divorce, by husband against wife, or the reverse, without the intervention of any next friend, the necessary consequences must be considered as following; such as, that a wife may appear by attorney, and adopt, *suo jure*, all measures incident to the prosecution or defence of such suit. And we think it follows, that when she is entitled to judgment for costs, she may have an execution, which cannot be defeated by the party against whom such judgment is rendered, and that any attempt to do so would be an unwarrantable attempt to defeat and avoid legal process.

Judgment for costs

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Thomas E. Steel *vs.* Benjamin W. Cook.

A deed to husband and wife, executed before the revised statutes took effect, conveying land to be held by them during their lives and the life of the survivor, and by the heirs of their bodies, created an estate tail in the grantees.

The reversion expectant on the determination of an estate tail is a vested interest, which may be devised, and which will pass to a devisee under a general residuary clause in a will.

When the owner of such reversion limits the same by way of executory devise, on the contingency of there being issue of a future marriage of one of the tenants in tail, the residuary devisee of the reversion may grant the same to a third person, subject to such executory devise.

Writ of entry to recover an undivided part of a tract of land in Lenox, which the demandant claimed to hold in common with Charles B. Steel, Charles Worthington and Ira Belden. Both parties to the suit claimed title through Thomas Steel, deceased, the grandfather of the demandant. Said Thomas, by deed dated June 17th, 1806, conveyed said tract of land, with other lands, to Caleb Hyde and Rhoda Hyde, wife of said Caleb, and daughter of said Thomas, "to hold to them during their lives and the life of the survivor, and to the heirs of the bodies of said Caleb and Rhoda; and if they shall die without heirs of their two bodies, then the before granted premises shall revert to said Thomas, his heirs and assigns forever."

Said Thomas Steel died on the 14th of June, 1825, and his will, which was dated June 18th, 1806, and duly proved and allowed in July, 1825, contained the following clauses: "Whereas I have, by my deed, bearing date the 17th day of this instant, conveyed to Rhoda and Caleb Hyde, and the heirs or issue of their two bodies, certain lands therein described, and in default of such issue, then to my heirs; it is nevertheless my will, if after the decease of said Rhoda and Caleb without such issue, there should be issue of said Rhoda by another marriage, that in such case, the land shall descend to such issue of the body of said Rhoda, in fee."

"To my son Thomas, and my daughters Anna and Rhoda, I give in equal proportions, and to their heirs and assigns for-

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ever, all the rest and residue of my estate, whether real, personal or mixed."

Said Caleb and Rhoda, by deed, dated March 18th, 1834, conveyed to Cook, the tenant, the tract of land demanded in this action, to hold during their lives and the life of the survivor; and also by deed, dated August 1st, 1834, conveyed to the tenant, in fee simple, one undivided third part of said tract. Title to this third part is all that the tenant claims, or ever has claimed.

Said Caleb Hyde died on the 7th of March, 1838, without issue, and said Rhoda died on the 4th of January, 1839, also without issue.

It was agreed by the parties, that if, on these facts, the demandant and his said cotenants are entitled to hold the said tract of land, the tenant should be defaulted; otherwise, that the demandant should become nonsuit.

Bishop, for the demandant.

Byington and *G. J. Tucker*, for the tenant, cited 2 Bl Com. 110. 112. 175. 4 Dane Ab. 526.

PER CURIAM. By the deed of Thomas Steel, Caleb Hyde and Rhoda, his wife, took an estate tail; for, though the rule in *Shelley's case*, 1 Co. 94, had been modified by *St.* 1791, *c.* 60, § 3, yet such modification extended only to estates created by devise, and not to estates created by deed.* But as they never took any measures to bar the entail, the reversion expectant upon the determination of the estate tail remained in the grantor, and would have done so, if no express words to that effect had been contained in his deed. Co. Lit. 22 *b*. Then by his will, made the day after the execution of the deed, after reciting the deed, he provided that, in default of issue of both Caleb and Rhoda Hyde, to take, under the first limitation, as heirs in tail, if his daughter should again marry and have issue, such issue should take the estate in fee. Supposing this last gift good, by way of executory devise, still as the contingency, upon which it was to arise, never happened, it did not affect the reversion remaining in the devisor. By the residuary clause in his will,

* By the Rev. Sts. *c.* 59, § 9, the same modification is extended to estates created by deed.

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he gave all the residue of his real estate to his son and two daughters in fee, of whom Rhoda was one. The reversion being a vested interest, (2 Cruise's Digest, 3d Amer. ed. 443,) subject only to be divested in favor of the issue of the daughter by another marriage, by way of executory devise, which contingency never happened, this reversion passed by his decease to his son and two daughters, and of course Rhoda took one third of the estate in fee, which passed by the deed of August 1st, 1834, executed by her husband and herself, to the tenant, to whom their life estate had before been conveyed by the deed of March 18th, 1834.

But the result would have been the same without the devise. In that event, the son and two daughters would have taken the same reversion in the same proportions, as heirs at law, and the deed of her husband and self, duly executed, would have vested the same title in the tenant.

Demandant nonsuit.

THOMAS H. SPENCER & another *vs.* ROGER CONE & another.

An agreement to make machines for a specified price, and to find the materials therefor, is not within the statute of frauds — Rev. Sts. c. 74, § 4.

ASSUMPSIT. The declaration alleged, and the evidence at the trial tended to prove, a special agreement between the parties, by which the plaintiffs undertook to make for the defendants ten stave machines, and find the materials therefor, for the price of $150 each, to be paid therefor by the defendants, and that the plaintiffs made and tendered the same to the defendants, who refused to accept or pay for them. Said agreement not being in writing, the defendants objected that it was within the statute of frauds: but *Wilde*, J. before whom the trial was had, overruled this objection, and the plaintiffs obtained a verdict. The defendants alleged exceptions to this ruling.

Bishop and *Sumner*, for the defendants, referred to the opin-

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ion of *Littledale*, J. in the case of *Smith* v. *Surman*, 9 Barn. & Cres. 573 — 575; and to *Dole* v. *Stimpson*, 21 Pick. 384.

Byington, for the plaintiffs, relied on *Mixer* v. *Howarth*, 21 Pick. 205.

PER CURIAM. This case is not distinguishable in principle from that of *Mixer* v. *Howarth*, 21 Pick. 205. The agreement was, in substance, for the furnishing of labor and materials, and not a contract of sale. It was therefore not required, by the statue of frauds, (Rev. Sts. *c.* 74, § 4,) to be in writing.

Judgment on the verdict.

HUMPHREY ANTHONY *vs.* INHABITANTS OF ADAMS.

County commissioners, having laid out a highway through a town, and across two channels of a stream, ordered the town to make an embankment, several rods from the highway, which should turn all the waters of the stream into one of its channels, and prevent the necessity of making more than one bridge in the highway. The town passed no vote, and did no act, on the matter; but the selectmen caused the embankment to be made, and paid for making it, by an order on the town treasurer. *Held*, that the town was not liable to an action by the owner of land which was flooded and injured in consequence of the making of the embankment.

THE only facts, in this case, which it is necessary to prefix to the opinion of the court, are these: The county commissioners of Berkshire ordered the town of Adams to make the embankment which caused the injury alleged in the plaintiff's declaration. Said embankment was thereupon made by an individual, by direction of the selectmen of the town, who paid him therefor by an order on the town treasurer. There was no vote or action of the town upon the matter.

Briggs and *Rockwell*, for the plaintiff.

D. N. Dewey, for the defendants.

SHAW, C. J. This is an action on the case to recover damages, for injuries to the plaintiff's lands by flowing, caused by the erection of an embankment by the agents of the defendants. It appears by the case that a highway was laid out, through the town of Adams, and that it crossed the Hoosic river, where it

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divided into two branches, and in such a manner, if it passed in a direct line, as to render two bridges necessary. To avoid this necessity, an embankment was made across one of these branches, and a cut made to turn the whole of the water into the other, and thus cause it to pass through one bridge only. This embankment was erected at a distance of eight or ten rods above the road, and on land not of the plaintiff's, but above his land; and the gravamen of the complaint is, that by the erection of this embankment, and by changing the direction of the water-course from its natural bed, the plaintiff's lands were flooded and injured.

One question discussed was, whether an action sounding in tort would lie against a municipal corporation. We can have no doubt, that an action upon the case will lie against municipal corporations, when such corporations are in the execution of powers conferred on them, or in the performance of duties required of them by law, and their officers, servants and agents, shall perform their acts so carelessly, unskilfully or improperly, as to cause damage to others. This falls within the very general principle, that the superior or employer shall be answerable *civiliter* for the mismanagement and negligence of the agent employed by him, by which another is damnified. *Sutton* v. *Clarke*, 6 Taunt. 29. And although such action sounds in tort, to mark the distinction between this and an action upon contract; yet the true view of considering it, is that of a legal liability to indemnify another against negligence of one for whom the law holds him responsible. It implies no wilful act, or intended wrong, and, therefore, requiring no vote or corporate act to create the liability, it may as well lie against a corporation as an individual person. We think it stands on the same footing on which it is now held, both in this country and in England, contrary to the ancient notions on that subject, that corporations may be liable on implied promises raised by law from their legal liabilities. *Gray* v. *Portland Bank*, 3 Mass. 364. *Bank of Columbia* v. *Patterson*, 7 Cranch, 299. *Clark* v. *Mayor, &c. of Washington*, 12 Wheat. 40. *Beverley* v. *Lincoln Gas Light and Coke Co.*, 6 Adolph. & Ellis, 829. But where individuals, although pro-

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fessing to act under color of authority from municipal corporations, do acts which are injurious to others, if the objects and purposes which they propose to accomplish, are not within the scope of the corporate powers of towns, and not done in the execution of any corporate duty imposed upon the town by law, the town is not liable for the damages occasioned by such acts Were it otherwise, towns might be rendered responsible upon implied liabilities, in cases where they could not bind themselves, as a corporation, by an express vote of the inhabitants. For, it is now well settled that a town, in its corporate capacity, will not be bound, even by the express vote of a majority, to the performance of contracts, or other legal duties not coming within the scope of the objects and purposes for which they are incorporated. *Stetson* v. *Kempton*, 13 Mass. 272. *Norton* v. *Mansfield*, 16 Mass. 48. *Parsons* v. *Goshen*, 11 Pick. 396.

Looking at the declaration in the present case, it is not shown that the town was under any obligation, in its corporate capaci ty, to erect and build this highway, or that the dam complained of was a part of the highway, or that the damage complained of resulted from the negligence of the agents and officers of the town, in the performance of any corporate duty. The court are, therefore, of opinion that the action cannot be maintained. We do not, however, put this decision merely upon the form of the declaration. We are strongly inclined to the opinion that in no mode of declaring upon the facts, as we understand them, could the plaintiff recover.

We are not aware that the town would be bound, or have a right, to erect a separate and independent work, not lying within the line of the road as laid out, or adjacent to it, but wholly detached from it, although such independent embankment or other work might facilitate the building, maintenance and future repair of the highway ; nor are we aware of any authority, on the part of county commissioners, to require of towns the execution of such a work. No provision is made by law, for the estimate and payment of damages for land taken for the erection of such detached work, or for the incidental damages arising therefrom. The case is not expressly provided for, in any of the acts im-

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posing on towns the duty of making and maintaining highways; and it would be carrying the doctrine of implied powers to a great length, were it held that the power is given by implication. A case may be imagined, in which it would be for the interest of a town to incur expense in executing some work not within their corporate power, in order to avoid a still heavier expense in performing their legal duty. A town might be so situated that it would be cheaper to make and maintain a canal, than to make and maintain a road, with its necessary bridges and embankments. But a town is authorized and may be required to build a road, and the act would be a corporate duty, by the performance of which the town might raise money by taxes, make contracts, employ officers and agents, for whose care, skill and fidelity they would be responsible. But a town cannot be required by law, nor have they any authority, to dig a canal; and any vote, contract, or corporate act done in reference to such a purpose, would be nugatory. A town might be so situated near the outlet of a lake or pond, where a road would be liable to be flooded and damaged by freshets, and where a very heavy expense would be required for the necessary bridges and embankments, but by cutting a canal and making a new outlet at the opposite side of the lake, at some distance, this expense might be saved. This would hardly be sufficient to raise a constructive power in the town, to undertake such distant canal, or to confer an authority on county commissioners to require it. It would lead to a latitude of construction, in regard to corporate powers and duties, which would be in a high degree dangerous. Such a case can seldom occur, and when it does, and is of sufficient importance, it is better to leave it to be provided for by a special act of the legislature, which is the source and fountain of all public authority. Such an authority may be adapted to the particular case, and limited and modified, as the circumstances of each case may require.

In the present case, the damage complained of appears to have been caused by the erection of a dam, for the building of which the town were not responsible, and therefore this action cannot be maintained. *Plaintiff nonsuit*

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Josiah Brewer *vs.* Harvey Holmes.

When judgment is rendered against a party who had no notice of the pendency of the suit, a review will be granted, on his showing probable grounds of defence.

On a petition for a review, upon the ground that the party had no notice of the original action, evidence is admissible to contradict an officer's return which states that he gave the party a summons for his appearance at court. And though the record shows that the petitioner appeared to the original action, by attorney, evidence is admissible that such appearance was at the request of a third person, and without the petitioner's knowledge.

This was a petition for a review of a judgment of the court of common pleas, recovered against the petitioner by default The petitioner alleged that he was out of the Commonwealth, at the time of the service of the original writ, and had no notice of the suit until after the rendition of judgment. The return of the officer, who served the writ, was, that he had "delivered a summons to the defendant for his appearance at court." It also appeared from the record that the petitioner, at the return term, appeared to the action, by attorney, and that the action was continued.

The petitioner offered evidence that he left the Commonwealth, previously to the service of the writ, and did not return until after the judgment. The respondent resisted the introduction of this evidence, insisting that the return of the officer showed that he had delivered a summons to the petitioner personally, and that the return could not, on this petition, be disproved; but that the petitioner's remedy, if any, was by an action against the officer for a false return.

The petitioner contended that the return did not state explicitly that the officer had delivered a summons to him personally; and that if the return had so stated, yet he was not precluded by law from showing, in support of his petition, that the return was false.

The petitioner also offered evidence that the attorney entered an appearance in the original action, at the request of the petitioner's brother, who had learned that the action was com-

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menced, and supposed that a continuance for one term would be for the petitioner's benefit.

The respondent objected to the reception of this evidence, on the ground that it was a denial of the record which showed that the petitioner appeared to the action.

The evidence, on both points, was received by the court; and the petitioner also introduced strong *primâ facie* evidence of a legal defence to the action.

Sumner and ***Byington***, for the petitioner.

Bishop and ***Briggs***, for the respondent.

SHAW, C. J. It may be a doubt whether the strict doctrine of estoppel ought to apply to a case in which the fact is not stated with precise accuracy, and where the return itself is doubtful or ambiguous. But without laying much stress upon this consideration, the court are of opinion, that the rule cannot apply to a proceeding like the present. The power to grant a review is given to the court, in the broadest terms, in all cases, if they shall think it reasonable. Rev. Sts. *c.* 99, § 19. One of those cases may be, where the party has been so trammelled by the application of technical rules, as to have lost the benefit of a trial, which the law intended he should have. Technical rules are framed with a view to promote justice, and secure to parties their rights, and in general they will tend to accomplish that great object. But a general rule may often, in its application to a particular case, work injustice; and one main purpose of equity is to relieve against such operation. Estoppels, for instance, generally apply where a party has admitted some fact to be true, or has assumed and acted upon it as true, or, which is nearly the same, has agreed to consider it as true, whether true or not, or even if he knows that it is not true. As where one agrees to be bail, he is estopped to deny the arrest. ***Bean v. Parker***, 17 Mass. 591. In all such cases, estoppels tend to promote justice, though they may exclude truth. But it is evident that the general application of these rules may, in some instances, reach a case, where the exclusion of the truth would tend to injustice. Such a rule, therefore, ought not to be acted upon, in a case where a large, equitable, judicial discretion is

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given to the court to relieve against a judgment, so far as to allow the parties to be heard, when no trial has been had.

Some illustrations may render this more clear. A party is bound by his agreement made by himself or his attorney in the cause. Suppose an attorney has, in a particular case, consented to a default, and judgment has been rendered. It turns out afterwards, by the clearest proof, if the defendant is not precluded from offering it, that the principal instructed his attorney to appear for him in two causes, to consent to a default in one, and make a defence in the other on the merits. This mistake, without fault of the attorney, is afterwards shown to the court, together with plenary evidence of a good defence. We think the evidence would be admissible, and that it would be the duty of the court to grant a review.

One of the rules of law is, that a party cannot deny the record. In this case, it is shown by the record that the petitioner appeared to the former action by his attorney; but he has shown, and we think, for the reasons already assigned, it was competent for him to show, that such appearance was made at the request of his brother, without any instruction from the petitioner, and that the latter in fact had no actual notice of the suit.

It is said that the petitioner would have a remedy upon the officer for a false return, and, on showing his defence to the first action, recover back from him the amount he had been compelled to pay. Supposing he could, which may be doubted, the result would be, that the present respondent, the original plaintiff, would have a sum of money, which, in the case supposed, he had no just claim to recover, and the officer would be compelled to pay a like sum, for a slight and perfectly innocent mistake. An officer goes to a house to leave a summons with John Smith; not knowing the person, he is led to believe, without fault of anybody, that his brother James Smith is the man he is looking for, and he leaves the summons with him and makes his return accordingly. This is a false return. If somebody must necessarily suffer loss, in consequence of this mistake, it is no doubt right that it should fall on him who made it. But

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if it is seasonably discovered, in time to prevent loss to anybody, why should not the remedy be applied, and the rights of all parties be saved? The effect of a review will be simply to give the petitioner opportunity to make a defence. If he cannot do this successfully, the respondent will have his judgment affirmed, with additional interest and costs. If he has a good defence, the respondent ought not in justice to hold and enforce the judgment he has obtained in the petitioner's absence. We think the power confided to the court to grant reviews, in all cases where there is reasonable cause, and upon such terms as they deem just, is a highly important one. It is intended to relieve parties, in particular cases, against the injustice which must almost necessarily arise from the working of a general system; and we think it should be exercised, if possible, in such a manner, that whilst it shall prevent injustice and hardship in particular cases, it shall not encourage carelessness, ignorance, and general laxity of practice, in the conduct of causes in judicial tribunals.

Petition granted.

Franklin O. Sayles *vs.* Peter Briggs.

Where, in an action of slander, the declaration contains two counts alleging the utterance of similar words at different times, and a verdict is returned for the plaintiff, on one count, and for the defendant on the other, the counts are not on several and distinct causes of action, so as to entitle the defendant to costs, within the true meaning and intention of Rev. Sts. c. 121, § 16.

This was an action of slander, and the declaration contained two counts alleging the utterance of similar slanderous words by the defendant, at different times. A verdict was returned for the plaintiff on the first count, and for the defendant on the second. The defendant claimed costs for the travel and attendance of the witnesses examined by him on the trial of the second count, under the provision in Rev. Sts. c. 121, § 16. These witnesses all testified respecting the facts in controversy on the issues upon both counts; the defendant having justified

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the speaking of the words, and having attempted to prove them to be true.

Wells and *Porter*, for the defendant, cited *Canfield* v. *Gaylord*, 12 Wend. 236. *Seymour* v. *Billings*, 12 Wend. 285. *Rogers* v. *Arnold*, 12 Wend. 288, *note*.

Bishop, for the plaintiff.

WILDE, J. The defendant moves for costs on the last count in the declaration, the jury having returned a verdict in his favor on that count. The motion is founded on the Rev. Sts. c. 121, § 16, which provides that "when there are two or more counts, in any case, on several and distinct causes of action, and a verdict shall be rendered for the plaintiff on one or more of them, and for the defendant on any other or others, each party shall recover his costs, paid for the travel and attendance of witnesses, and for depositions and other evidence, produced, examined or used on the trial of the counts, upon which the verdict is in his favor." To bring a case within this section, it must appear that there are two or more counts in the declaration on distinct causes of action; and this we think does not appear in the present case. It is true that the causes of action, in one sense, are distinct, but not within the true meaning and intention of the statute. The defendant is charged with the speaking of slanderous words at different times; but in both instances the import of the words is the same, charging the plaintiff with the same offence. All the evidence, offered in support of the two counts, would have been admissible, if there had been but one count in the declaration. Words spoken at different times may be included in one count; Stark. on Slander, 369; and words not specified in the declaration may be given in evidence to prove malice, although the words so given in evidence be actionable. Holt on Libel, 291, 292, *note*. 2 Stark. Ev. 869, 870. The plaintiff's evidence, therefore, might have been the same, if there had been only one count in the declaration, and there had been no charge of the repetition of the slanderous words. So also, as the defendant justified the speaking of the words, and attempted to prove them true, he incurred no additional expense in consequence of the second

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count. We think, therefore, that this is not a case within the true meaning of the statute, and the defendant's motion for costs must be overruled.

ALFRED WHITE *vs.* EDWARD I. JUDD.

Under the Rev. Sts. c. 121, § 36, actual travel of a party to a suit, who resides without the State, can be taxed only from the line of the State, in the usual route from his residence to the place where the court is held.

THE defendant, having obtained a verdict, taxed in his bill of costs 200 miles travel, that being the distance which he had actually travelled to and from his residence in Ithaca, in the State of New York, for the special purpose of attending the court in this cause. To this taxation the plaintiff objected.

Bishop, for the plaintiff.

D. N. Dewey, for the defendant.

WILDE, J. We have decided that actual travel of a witness from another State can be taxed only from the line of this State, in the usual route from his residence to the place of holding the court; *Melvin* v. *Whiting*, 13 Pick. 190; and there seems to be no good reason for giving a more liberal construction to the Rev. Sts. c. 121, § 36, in regard to the actual travel of a party. As the defendant has not actually travelled more than forty miles within the State, he can be allowed for travel only as if he had not attended the court in person; viz. eighty miles out and home.

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Housatonic Bank & Lee Bank *vs.* Calvin Martin & another, Administrators.

Where a mortgage of goods was made, subject to a prior mortgage thereof, and they were attached by the mortgagor's creditors, and replevied by the first mortgagee, and on the trial of the action of replevin, the first mortgage was decided to be void, and judgment was rendered for a return of the goods to the attaching officer; a demand on the officer, by the second mortgagee, ten days after the rendition of such judgment, accompanied with an account of the debt for which the goods were liable, conformably to the Rev. Sts. *c.* 90, § 79, was held to be within a reasonable time, although was more than two years after the goods were attached.

When goods are attached, which have been conveyed by one mortgage to two persons to secure a gross sum of money to each, a statement by them to the attaching officer, on their demanding payment of him, is sufficient, under the Rev. Sts. *c.* 90, § 79, if it set forth the gross sum due to each of them.

A debtor, on being called upon by A., one of his creditors, to give security, promised to do so by a mortgage of his personal property: He thereupon directed his attorney to prepare, 1st. a mortgage of his personal property to secure B., another of his creditors; 2d. a mortgage of the same property, subject to the first mortgage, to secure A.; 3d. a general assignment of all his property to B., under *St.* 1836, *c.* 238, subject to the two mortgages: The mortgages and assignment were all executed and delivered on the same evening, in the order in which they were directed to be prepared, A not knowing of the mortgage to B. till he received the mortgage to himself, and having no knowledge of the assignment, until after it was executed and delivered, and never afterwards assenting thereto: The mortgage to B. having been adjudged void, because it was part of the assignment, and in contravention of said *St.* 1836, it was *held* that A.'s mortgage was not part of the assignment; that it was valid by the common law; and that he was entitled to hold the mortgaged property against the attaching creditors of the mortgagor, in the same manner, and to the same extent, as if the mortgage to B. had not been made.

Knowledge of facts, by a mere stockholder in an incorporated manufacturing company or bank, is not notice to the corporation of the existence of those facts.

This was an action against the administrators of Henry C. Brown, late sheriff of this county, for an alleged trespass by him, on the 3d of August, 1837, in taking and carrying away, by his deputy, John Holden, a large amount of the plaintiffs' goods. The defence was, that said goods were the property of Caleb B. Turner & Wells Laflin, and were, on said 3d of August, attached by said Holden, upon several writs against them. The trial was before *Wilde*, J. from whose report of the case it appeared that the plaintiffs claimed the goods under a mortgage thereof, made by said Turner & Laflin, on the 20th

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of April, 1837, to the Housatonic Manufacturing Company, (a corporation,) and John King, Jr., and which was assigned by said company to the plaintiffs, on the 6th of May, 1837, and assigned, by said King, to the Lee Bank, on the 23d of September, 1839.

At the time when said mortgage was given, said Turner & Laflin were indebted to the Housatonic Manufacturing Company for goods sold and for money lent, the sum of about $ 15,000, for which, at different times, as the goods were sold, said Turner & Laflin had given to said company their notes of different dates, payable generally at four months, in New York or Troy, with an express parol agreement, made before the goods were delivered, that said notes should not be received as payment for the goods, until paid. These notes had been discounted for said company by the Housatonic Bank and the Lee Bank; were indorsed by said company, and held by said banks, at the time of the making of said mortgage; and were unpaid at the time of the trial. One of these notes fell due on the 16th of April, 1837, and was protested for non-payment. Another was to become due on the 20th of said April, and others in a few days afterwards.

Under these circumstances, P. D. Whitmore, the agent of said company, sent said King to Adams, where said Turner & Laflin resided, for the purpose of procuring from them security for the debt due from them to the company. Wells Laflin, one of the firm of Turner & Laflin, returned immediately with said King to Housatonicville (the place of said company's business) on the morning of April 19th, and there, on being pressed by said Whitmore for security, said Laflin agreed with said Whitmore to give to said company the required security, by a mortgage on personal property. Said Whitmore then proposed to go with said Laflin and procure the mortgage to be made; but Laflin objected, saying that if they were seen together, it might excite inquiry; and he promised, upon his honor, to get the mortgage drawn, take it to Adams, execute it with Turner, and deliver it to King, who was to meet said Laflin at Adams for the purpose of receiving it.

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Before going to an attorney to get the mortgage drawn, said Laflin consulted with his brother, who advised him "not to move" until he had secured his father, Heman Laflin, and his father-in-law, Abner Perry, who were indorsers of a large amount of said Turner & Laflin's paper. Said Laflin concluded to secure his father and father-in-law, but designedly kept this purpose from the knowledge of said Whitmore and King; and he directed his attorney to draw the following instruments: 1st. A mortgage of personal property from Turner & Laflin to Abner Perry, Heman Laflin and Gershom Turner, to secure them for their liabilities for the mortgagors, and also to secure $1600 due from the mortgagors to Walter Laflin and J. M. Boies: 2d. A mortgage of the same property to the Housatonic Manufacturing Company, subject to the previous mortgage, to secure the aforesaid sum of $15,000, and also to secure said King about $600: 3d. A general assignment of all said Turner & Laflin's property to said Abner Perry, Heman Laflin, and Gershom Turner, subject to said mortgages, for the benefit of all their creditors. Said Wells Laflin told said attorney that the moving cause of his and Turner's making the assignment was their being pressed for security by the Housatonic Manufacturing Company. He designedly kept from the knowledge of Whitmore and King his intention to make a general assignment, and requested the attorney to keep it secret.

Said mortgages and assignment were drawn by the attorney at Lee, and by him taken to Adams. The mortgage to the Housatonic Manufacturing Company was there executed by Turner & Laflin, at the House of Wells Laflin, in the evening of April 20th, and delivered by the mortgagors to said King, he being a stockholder and director of said company, and was accepted by him, in behalf of said company—the said mortgage to Abner Perry and others having been previously executed and delivered to said Perry. Said Perry, in behalf of himself and his co-mortgagees, and said King, in behalf of said company, immediately went and took possession of said mortgaged property. While said Perry was absent, the last clause, and the attestation were added to the assignment, and also the certificate of acknowledgment, and

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oath, and the seals. After said Perry's return, the assignment was executed by the assignors and by him, and was delivered to him. This was between 7 and 11 o'clock, P. M. of April 20th, and between half an hour and two hours after the execution of the mortgages. Said King was not present. After the execution and delivery of the assignment, said Perry went to find some one to carry the assignment to Gershom Turner, to be executed by him, and to the register's office to be recorded. He returned with said King, and delivered to him the assignment, with instructions to procure said G. Turner to sign it, and then to carry it to the register's office. There was no evidence that King read it, or was told what it was. Wells Laflin testified that he *presumed* King did know what it was. He also testified that the conveyances executed on the 20th of April were intended to convey all the property owned by Turner & Laflin jointly, and by said Laflin separately. The mortgages included all the personal property, except goods in Philadelphia, worth $600 or $700, and choses in action to the amount of several thousand dollars, part of which have proved to be unavailable.

The condition of the second mortgage was thus: "Now if the said Caleb B. and Wells shall well and truly pay the said Housatonic Manufacturing Company the sum of $15,000, and the said John the sum of $600, then this deed shall be void," &c.

The draft of the assignment remained in the pocket of the attorney until after said King went out to take possession on his mortgage; and said mortgage was left by said King with the attorney to be carried to the town clerk's office to be recorded.

Neither Whitmore, agent as aforesaid, nor said King, had any knowledge that said assigment was drawn or contemplated, until after it was executed and delivered. Said Whitmore had no knowledge that Turner & Laflin intended to make said mortgage to Perry and others; nor did said King know it until the same was delivered to said Perry. Said Whitmore knew of the mortgage to the Housatonic Manufacturing Company, before he was informed of the assignment.

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Said Perry remained at Adams, and held possession of the mortgaged property until the goods were attached by said Holden, and forbade his interfering with the goods, at the time he made the attachment. Part of the mortgaged goods were replevied by Perry and others, the first mortgagees, and Holden had judgment for a return thereof at the September term, 1839, of this court. They were not returned, but the replevin bond was satisfied by payment and security.

Said first mortgagees commenced an action against the defendants' intestate for said Holden's act in attaching the residue of the mortgaged goods, and became nonsuit at the May term 1840.

On the 25th of September, 1839, the plaintiffs made two statements, in writing, of the demands for which said mortgaged property was liable, and delivered the same to said Holden. The second statement was as follows :

"To John Holden, Deputy Sheriff. Sir, — On the twentieth day of April, 1837, Caleb B. Turner and Wells Laflin, then of Adams, executed to the Housatonic Manufacturing Company and to John King, Jr., a mortgage of the following articles of personal property. [Here the articles were enumerated.] To secure to the said Housatonic Manufacturing Company the payment of about fifteen thousand dollars due from said Turner & Laflin to them, and to said King, the payment of about six hundred dollars due from said Turner & Laflin to him. And on the 6th day of May, 1837, the said Housatonic Company transferred and assigned their debt against said Turner & Laflin, and the mortgage aforesaid, to the President, Directors & Company of the Lee Bank, and to the President, Directors & Company of the Housatonic Bank ; and since said 6th day of May, said King has assigned his debt against said Turner & Laflin to said Lee Bank, and his interest in said mortgage. The President, Directors & Company of the Housatonic Bank, and the President, Directors & Company of the Lee Bank, have been informed that the property aforesaid has been attached by you on a writ in favor of the Adams Bank against said Turner & Laflin, and on writs in favor of divers other persons, against said Turner & Laf-

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lin. This is to notify you that there is now due on the demands of said Housatonic Manufacturing Company against said Turner & Laflin, and secured by the mortgage aforesaid, and assigned to said Lee Bank and Housatonic Bank, the sum of $ 16,052·46; and that there is now due on the demand of said King against said Turner & Laflin, secured by mortgage and assignment as aforesaid, the sum $ 681·89, amounting in all to $ 16,734·35. The payment of which sum said President, Directors & Company of the Housatonic Bank, and the President, Directors & Company of the Lee Bank now demand of you."

The first statement delivered to Holden did not contain an enumeration of all the articles mortgaged, but mentioned only "fifteen thousand pieces of calico and cotton goods, and fifty thousand bricks," and demanded a delivery of "all the personal property mortgaged" to the Housatonic Manufacturing Company and to King. Said statement set forth, as due to the Housatonic Bank, "the sum of $ 1206·74, due July 4th, 1837," and seven other sums due, at several different times specified in said statement, amounting, in the whole, to $ 11,057·97.

The several sums due, on different days, to the Lee Bank, were set forth in the same manner, amounting to $ 3610·97.

To each of these aggregate sums was added the interest due on the several sums of which they were composed, from the times when the latter sums respectively became due, to the day of said statement, viz., interest due to the Housatonic Bank, $ 1554·99, and to the Lee Bank, $ 510·52. And to each of the final aggregates thus made up, as due to each of said banks, were suffixed these words, — "if computation is wrong, it may be corrected."

In this first statement, no notice was taken of the sum due to King, nor any demand made on Holden to pay the sums mentioned therein.

W. Porter, Jr., the attorney of the Lee Bank, had knowledge, in the month of August 1837, of the attachments made by Holden; and one reason why the plaintiffs did not make an earlier demand and statement was, that the aforesaid suit by the first mortgagees was pending.

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The attorney who drew the mortgages and assignment was a stockholder in the Lee Bank. Walter Laflin, a stockholder and director in said bank, assisted in drawing the mortgages, and knew that said attorney was at the same time drawing the assignment. Wells Laflin, at the time of the making of said mortgages and assignment, was the owner of one share in the capital stock of the Housatonic Manufacturing Company.

On the foregoing evidence, a verdict was taken for the plaintiffs, for the sum of $20,000, which was to be altered, or set aside and a new trial granted, or such other disposition of the cause was to be made, as the court should order.

Wells and *Robinson* (*D. N. Dewey* was with them), for the defendants. The demand and statement were not seasonably made by the plaintiffs. The Rev. Sts. *c.* 90, intended to give a beneficial power to creditors of a mortgagor; but if they can be called upon, two years after an attachment, and be compelled to pay the value of the goods, this statute power may operate to their ruin instead of their benefit. The demand should have been made while the property was in the officer's hands and could be delivered by him, and while the attaching creditor could give up his attachment and surcease his suit. In *Johnson* v. *Sumner*, (*ante*, 172) a year's delay was excused only because the plaintiff was in the mean time pursuing his claim in another way. The statements were too general, giving aggregate sums without the particulars. *Allen* v. *Clark*, 17 Pick. 47. *Johnson* v. *Sumner*, *ubi sup.* Besides, as the attaching creditors succeeded the first mortgagees, the plaintiffs should have called on the defendants to pay the surplus only, after deducting the amount secured by the first mortgage.

The mortgage, now held by the plaintiffs, cannot avail them. If Turner & Laflin had made it in contemplation of an assignment, it would have been void. *Locke* v. *Winning*, 3 Mass. 325. But it was a part of the assignment, and void as contravening *St.* 1836, *c.* 238. The case of *Perry* v. *Holden*, 22 Pick. 269, being like this, in all material circumstances, seems decisive against the plaintiffs.

The plaintiffs' ground is, that they are not affected with the

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knowledge of the mortgagors' intention to make the assignment. But King had knowledge, and as Wells Laflin was a member of the Housatonic Manufacturing Company, and the attorney who drew up the mortgage and assignment was the attorney and one of the directors of the Lee Bank, the plaintiffs, therefore, had knowledge sufficient to put them on inquiry, and must stand on the same ground as if they had actual knowledge. *James* v. *Morey*, 2 Cow. 310. *Bignold* v. *Waterhouse*, 1 M. & S. 259. *Alderson* v. *Pope*, 1 Campb. 404, *note*.

The plaintiffs, being second mortgagees, have only an equitable title to the property; and can secure themselves only by paying the first mortgage. *Baldwin* v. *Norton*, 2 Connect. 164. At most, as they took subject to the first mortgage, they can recover only the value of the equity mortgaged to them; as they are estopped to deny the validity of the first mortgage. *Green* v. *Kemp*, 13 Mass. 515. *Commonwealth* v. *Andre*, 3 Pick. 224. 1 Saund. Pl. & Ev. 37, *et seq.*.

Porter and *Byington*, for the plaintiffs. The statement and demand were made in a reasonable time. The plaintiffs could not sue while the first mortgage was in force, and they made their demand in a few days after that mortgage was adjudged to be void. The account stated the exact amount due to the plaintiffs. *Whitwood* v. *Kellogg*, 6 Pick. 420.

In *Green* v. *Kemp*, cited by the defendants, an equity of redemption, *eo nomine*, was conveyed; and the court said, if the tenant had purchased *the land*, he might have avoided the previous usurious mortgage. In the case at bar, *the goods* were conveyed, subject to the mortgage which has been adjudged void; and the attaching creditors cannot take precedence of the second mortgagees.

In the former suit (*Perry* v. *Holden*, 22 Pick. 269) the first mortgage and the assignment were held to be one transaction, and void as in contravention of *St.* 1836, *c.* 238. But the second mortgage was no part of the assignment. The mortgagees had no knowledge that an assignment was contemplated, and have not in any way assented to it.

The statute of 1836 did not prohibit preferences by mort-

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gage, or by attachment, but only preferences in general assignments in trust for creditors; and the plaintiffs have as good legal right under their mortgage, as an attaching creditor under an attachment. The mortgage, being prior in time, gives priority of right. *Lupton* v. *Cutter*, 8 Pick. 303. A mortgage is not a conveyance in trust. *Bates* v. *Coe*, 10 Connect. 293.

When several instruments are construed to be one transaction, it is on the ground that such construction gives effect to the intention of the parties. *Wallis* v. *Wallis*, 4 Mass. 136. *King* v *King*, 7 Mass. 499. *Carey* v. *Rawson*, 8 Mass. 159. *Stow* v. *Tifft*, 15 Johns. 458. *Clap* v. *Draper*, 4 Mass. 267. The mortgage in question and the general asssignment were independent instruments. The former would have been made, if the latter had not been; and to construe them as one would thwart the parties' intentions. *Isham* v. *Morgan*, 9 Connect. 374. If the reference, in the assignment, to the mortgage, makes the two one transaction, then any grantor, by referring to a subsequent instrument which he designs to execute, may defeat or vary the first deed.

But if the second mortgagees knew (which, however, the evidence disproves) after they demanded security, that Turner & Laflin intended to make an assignment, that knowledge would not have impaired the second mortgage. *Warden* v. *Adams*, 15 Mass. 233. *Cushing* v. *Hurd*, 4 Pick. 253. *Holman* v. *Johnson*, Cowp. 342. *Hodgson* v. *Temple*, 5 Taunt. 181. Or if this position be denied, yet even if it had been shown that King had such knowledge, before the mortgage was made, it would not have affected the Housatonic Manufacturing Company, the other mortgagee. *Lawrence* v. *Tucker*, 7 Greenl. 195. If such knowledge by King would have vitiated the mortgage, as it respected his interest therein, still the mortgage would have been good as to the company. *Prince* v. *Shepard*, 9 Pick. 176. The case in 7 Greenl. *ubi sup.* is also an answer to the suggestion that the plaintiffs are affected with the notice which the attorney of the Lee Bank had of the intention of the mortgagors to make an assignment.

The transfer of the mortgage to the plaintiffs, *bonâ fide*, would

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have purged the fraud, if there have been any either in King or the company, or both, and enabled the plaintiffs to maintain this action as assignees of the entire mortgage. *Somes* v. *Brewer*, 2 Pick. 198. *Coffin* v. *Ray*, (*ante*, 212.)

That notice to a stockholder or director, in a case like this, does not affect the corporation, was held in *Washington Bank* v. *Lewis*, 22 Pick. 24. *Fulton Bank* v. *Sharon Canal Co.* 4 Paige, 127.

The opinion of the court (except *Dewey*, J. who did not sit in the case) was prepared by

PUTNAM, J. The plaintiffs claim the goods in virtue of a mortgage from Turner & Laflin, dated April 20th, 1837, given to the Housatonic Manufacturing Company, a corporation, and one John King, Jr. and by said company assigned to the plaintiffs on the 6th of May, 1837, and by said King assigned to the Lee Bank, on the 23d of September, 1839.

The case finds that Turner & Laflin were indebted to the Housatonic Manufacturing Company, about $ 15,000 for goods sold and delivered, for which notes were given that were not to be considered as payment until the same should be actually paid; and the plaintiffs discounted those notes, and are, without question, the *bonâ fide* assignees of the mortgage abovementioned.

The defendants claim to hold the property, in virtue of attachments made on several writs of creditors of Turner & Laflin against them, which were made long after the assignment of the Housatonic Manufacturing Company to the plaintiffs; to wit, on the 3d of August, 1837.

The mortgage, so assigned to the plaintiffs, was made subject to a previous mortgage of Turner & Laflin to Abner Perry and others, to secure them for their liabilities for Turner & Laflin, which was executed on the same day. Said Perry and others were, on the same day, parties to a deed of general assignment, by Turner & Laflin, of all their property, subject to said mortgages, for the benefit of all their creditors.

The officer, who made the attachments, was informed of the claim of the mortgagees, and was forbidden, by one of them, to meddle with the property. And the case further finds that

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the mortgage to Perry and others, and the general assignment to them, have been adjudged to be void, as being against *St.* 1836, *c.* 238, § 11. That case is in 22 Pick. 269, and the decision of the court was announced at the September term 1839. By the effect of that decision, the first mortgage was removed, and the plaintiffs, as assignees of the second mortgage, became entitled to all the rights which would have vested in them if the mortgage to Perry and others had never been made.

The ground on which the first mortgage was declared to be void was, that it was so connected with the general assignment made by the mortgagees and by Turner & Laflin, the mortgagors and assignors, as to constitute one instrument or transaction, for the accomplishment of one and the same object; which object was to give a preference to the said mortgagees over the other creditors of Turner & Laflin, contrary to the said *St.* 1836, *c.* 238, which provided for an equal distribution of the estate among the creditors who should become parties to such general assignment, except only debts which were preferred by law.

After the first mortgage was thus declared to be void, the plaintiffs, on the 25th of September, 1839, made their statement in writing, to the defendants, of the amount which they claimed under their mortgage, and made a demand of payment of the same. The defendants have contended that the statement was too general, and the demand too late.

The Rev. Sts. *c.* 90, § 79, require the mortgagee, when demanding payment of the money due to him, to state in writing a just and true account of the debt or demand for which the property is liable to him, and deliver it to the attaching creditor or officer. In this case, two statements were made on the said 25th of September, 1839. The last contained a recital of the mortgage to the Housatonic Manufacturing Company and to King; a statement of the plaintiffs' title as assignees; and the amount of the debts due to the plaintiffs as such assignees, and the demand of payment thereof. And the statement and demand are, in our opinion, sufficiently particular. It has not been intimated that the statement was unjust or untrue.

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The objection most relied upon, as to this part of the case, was, that the statement and demand were not made in a reasonable time — being more than two years from the time when the attachments were made by the officer, during all of which interval of time, it is said, the officer could not know what to do with the property. Now the statement and demand should be made in a reasonable time. *Johnson* v. *Sumner*, (*ante*, 172). The mortgage, which was assigned to the plaintiffs, was made subject to the mortgage of Perry and others. If that had been confirmed, the plaintiffs would have included the amount which they would have been held to pay on that mortgage, in their claim as assignees of the second mortgage. The defendants knew of the suit which was pending between the prior mortgagees and the attaching officer, which, we have seen, was not decided until September, 1839. And the statement and demand were made upon the attaching officer immediately afterwards. There is no evidence which would justify an inference that the plaintiffs had any sinister views in withholding any information, or that they had any intent to take any course for the purpose of embarrassing the other party. *Whitwood* v. *Kellogg*, 6 Pick. 420. The plaintiffs could not know, until after the decision of the case touching the first mortgage, whether or not they might legally demand or claim of the attaching officer the money which was secured by the first mortgage. And it is not contended that the plaintiffs were guilty of any laches after that case was decided. We think that the objection made in regard to the statement of the plaintiffs' claim, and to the demand of payment cannot prevail, for the reasons before stated.

But the great point of the defence is, that the mortgage, which has been assigned to the plaintiffs, is void, inasmuch as the general assignment was expressly declared to be made subject to the mortgages which Turner & Laflin had before made, which included this mortgage as well as that which was given to Perry and others. The plaintiffs' mortgage was executed on the same day on which the first mortgage and the general assignment were executed. The plaintiffs' mortgage was said to be subject to the first mortgage: and it is strongly argued for the defendants.

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that the plaintiffs' mortgage should be put upon the same ground as the first has been, and should be taken as part of the general assignment, and void, as against the statute of 1836, before cited. But the difference between the first and second mortgages consists in this, viz. that the first mortgagees were parties to the general assignment, and the second mortgagees were strangers to it. The Housatonic Manufacturing Company, by Whitmore their agent, and King, for himself, were proceeding against Turner & Laflin merely for their own security and benefit. They were not in the counsels of the first mortgagees or of Turner & Laflin. They insisted upon security. Laflin engaged, upon his honor, that the security required should be given. An the case finds that the intent of Turner & Laflin to make the first mortgage was designedly kept from the knowledge of King, and from Whitmore who was agent of the Housatonic Manufacturing Company. They were imposed upon by Turner & Laflin, and obliged to take their mortgage subject to that which was given, without their knowledge, to Perry and others. The case also finds, that Laflin designedly kept from the knowledge of Whitmore and King his intention to make a general assignment; and his attorney was also requested to keep the same secret. The assignment was executed one or two hours after the mortgages. King was not present when the assignment was executed. The mortgage to the Housatonic Manufacturing Company and to King was delivered to King, and he, in behalf of said company, went immediately for the purpose, and took possession of the property, before the writing of the assignment was completed. Any knowledge afterwards, which the company or King might have of the assignment, without participating in the arrangement, would not prejudice their claims under the mortgage.

It is found, indeed, that Perry gave the assignment to King, after it was executed, to procure Gershom Turner to sign it, and then to carry it to the register's office to be recorded, but that there was no evidence that King read it, or that he was told what it was. Wells Laflin *presumes* that King knew what the paper contained, but no facts are stated by Laflin from which

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such presumption could be made. But if King did know the contents of the paper, there is not the least evidence that he assented to its provisions, or agreed to accept the mortgage to himself and to the Housatonic Manufacturing Company, as connected with or subject in any manner to the general assignment.

The case of *Green* v. *Kemp*, 13 Mass. 515, has been relied upon to show that as the plaintiffs took their mortgage subject to the prior mortgage, they cannot be permitted to deny its validity. The objection to the first mortgage, in the case cited was, that it was void for usury. The tenant had purchased the right of redemption. It was held that a mortgage on a usurious consideration was void only as against the mortgagor and those who may lawfully hold under him. But the mortgagor might waive that legal objection, and pay his debt, without availing himself of the defence of usury. As between those parties, the mortgage was voidable, and not merely void. It would be in the power of the mortgagor to give validity to his deed, usury notwithstanding. But in the case at bar, the mortgagors had no such election or power. They had given a preference, contrary to the statute, and they could not avoid or repeal the statute. The extent, to which the doctrine of estoppel would apply, would be, that if this were a case between the first mortgagees and the plaintiffs, then the plaintiffs could not be permitted to deny that there was a prior mortgage: They must be considered as assenting and agreeing to hold subject to all the claims which the first mortgagees might by law enforce by virtue of their first mortgage. But it could not be carried further. The second mortgagees could not be concluded from showing that the first mortgage had been paid, or that, by force of the statute, it was merely void, notwithstanding all the good will of the mortgagors to make it good, and so that the first mortgagees were not entitled to recover any thing. The plaintiffs could not be precluded from showing that the first mortgage was, without their knowledge, procurement or participation, connected with the general assignment, in such a manner as to render it a mere nullity. The plaintiffs do not claim under the first mortgagees, and the doctrine of estoppel, therefore, does not apply.

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It has been contended that the plaintiffs should be affected with the constructive notice and assent, from the following facts, viz., that the attorney, who drew the mortgages and assignment, was a stockholder in the Lee Bank; that Walter Laflin was a stockholder and director in the same bank, and assisted in drawing the mortgages, and knew that the attorney was drawing the assignment; and that Wells Laflin, at the time of making the mortgages and assignment, was the owner of a share in the Housatonic Manufacturing Company. But we think that the legal inference from these facts cannot control the fact, expressly stated in the case, that neither Whitmore, the general agent, nor King, had any knowledge that said assignment was in contemplation, until after it was executed and delivered. And the rights of the Housatonic Manufacturing Company and of King, under their mortgage, were before fixed and vested in them. Besides, the knowledge which an individual, who is a mere corporator, might have, is not to be considered as constructive notice to the corporation. The draft of the assignment remained in the pocket of the attorney until after King went out to take possession of the property.

Under these circumstances, we are clearly of opinion that there is not sufficient evidence to affect King or the Housatonic Manufacturing Company with a knowledge of or participation in the general assignment, so as to put them upon the same footing as Perry and others, the first mortgagees, have been placed. The latter were trustees and parties to the general assignment. They were acting in concert with the insolvent debtors; but the company and King, from the beginning to the end, acted adversely.

The plaintiffs claim to recover on the ground that their mortgage was a valid conveyance at common law; and we think they have sustained their claim. There is not any evidence to show that Whitmore, agent of the Housatonic Manufacturing Company, and King, or either of them, had any knowledge of the general assignment until after the mortgage was delivered to them; and there is no evidence sufficient to prove that they ever assented to connect their mortgage with that assignment. And no

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lawyer will contend that the mortgagors could defeat their deed by a subsequent assignment with which the mortgagees had no concern.

It is the opinion of the court, that the plaintiffs are entitled to recover for all the property contained in their mortgage, in the same manner as they would have been if the mortgage to Perry and others had not been made; and the cause is to be submitted to a jury to ascertain the damages, unless the parties agree to an auditor, or themselves agree upon the amount.

HENRY J. HUNT *vs.* GEORGE WILSON.

On the trial, in the court of common pleas, of an appeal from a justice of the peace, a defendant cannot, under the Rev. Sts. c. 85, give in evidence, as a defence, his title to real estate, unless it appear by the pleadings, or by a statement on the justice's record, that such title was concerned or brought in question before the justice.

TRESPASS for breaking and entering the plaintiff's dwelling-house. The action was commenced before a justice of the peace, and the defendant appeared and pleaded the general issue. It did not appear, by the record of the justice or otherwise, that any suggestion was made before him, or that it appeared to him, that the title to real estate was concerned or was to be brought in question. The justice gave judgment for the plaintiff, and the defendant appealed. On the trial of the appeal, in the court of common pleas, before *Warren*, J. the defendant offered evidence that the title to the dwellinghouse was in himself and not in the plaintiff. This evidence was rejected by the judge, and a verdict was returned for the plaintiff; whereupon the defendant alleged exceptions.

Porter, for the defendant, argued that the course of proceedings, in cases of this nature, had been altered by the revised statutes. Under *St.* 1783, *c.* 42, § 2, when the general issue was pleaded before a justice, no evidence was admissible which might bring title to real estate in question. *Lynch* v. *Rosseter*, 6 Pick. 419. By Rev. Sts. *c.* 85, § 2, justices have jurisdic-

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tion, concurrent with the common pleas, of actions in which such title may be concerned ; and by § 3, either party may remove the action to the common pleas. By § 4, if the party requesting such removal fails to recognize, &c., the justice shall determine the case. From these provisions, it seems, that as the justice, in the present case, had jurisdiction, it is immaterial whether or not it appeared before him that title was in question. The defendant was not bound to make his whole defence. He might have appeared, pleaded, joined issue, given no evidence, and appealed ; and by § 13, he might have had his cause tried in the common pleas, " in like manner as if it had been originally commenced there." (See commissioners' notes to chapters 82 and 85.) If it had been originally commenced in that court, he clearly might have given title in evidence. By *St.* 1836, *c.* 273, § 1, all matter of law may be given in evidence under the general issue.

Byington and *G. J. Tucker*, for the plaintiff. The Rev. Sts. *c.* 85, apply only where it appears, " by the pleadings or otherwise, that the title to real estate is concerned," &c. By § 11, an option is given to a defendant to plead orally or in writing, but no change is made in the rules of evidence as to title to real estate, or as to any other matter of defence.

The defendant is confined to the alternative which he first selects. If he plead not guilty before the justice, and try the case without suggesting title, he cannot give title in evidence in the common pleas. He also is thereby precluded from appealing to this court ; otherwise he either deprives the plaintiff of a right to appeal, or gives jurisdiction to three courts ; which neither the legislature nor the commissioners ever intended.

Porter, in reply. The suggestion, that on the defendant's construction of the Rev. Sts. *c.* 85, three courts would have jurisdiction, is answered by § 6, which gives the right of appeal to this court only in cases *removed* to the common pleas. The question of appeal can have no influence on the exceptions in this case.

DEWEY, J. The Rev. Sts. *c.* 85, have obviously introduced somewhat material changes as to the course of proceedings in

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civil actions pending before justices of the peace. But these changes do not, in our opinion, authorize a defendant, in a case where it does not appear, by the pleadings or by the record of the justice, that any suggestion was made, before the justice, that the title to real estate was concerned or brought in question, to offer evidence of title, as matter of defence, upon a trial in the court of common pleas, on an appeal from the justice.

Three important changes seem clearly indicated. 1. The provisions of the Rev. Sts. on this subject embrace a larger class of cases than were included in *St.* 1783, *c.* 42; as they apply to all actions pending before a justice of the peace, while that statute was restricted to actions of trespass, exclusively. 2. The form of pleading, required in such cases, in order to raise the question of title to real estate, is varied; as it is sufficient that the defendant orally denies the right of the plaintiff to maintain his action, and alleges that the title to real estate is concerned or may be brought in question, and that this is stated by the justice on the record. 3. The more material change is, that when the title to real estate is brought in question, either by the pleadings in writing, or by the oral defence and the notice of it on the record, the justice may proceed to hear and determine the same, unless one of the parties request the removal of the same to the court of common pleas.

Neither of these changes seems to warrant the position of the defendant, that it is open to him, on the appeal, to raise for the first time the question of title to real estate. That such was not the intention of the legislature we think may be fairly inferred from the general provisions of the 85th chapter of the Rev. Sts., and particularly from the 6th section, providing for the further appeal to the supreme judicial court, in all cases removed to the common pleas, where it appears by the pleadings or otherwise, that the title to real estate was brought in question before the justice. This right of appeal to the supreme court would, upon the defendant's construction, be at his election alone, and to be determined by his mode of

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defence before the justice: whereas the manifest design of the statute was, that in all cases of title to real estate, both parties might have the opportunity of a trial in the supreme court. Although the right of appeal to this court, in actions of trespass *quare clausum*, is now taken away by *St.* 1840, *c.* 87, it does not affect the force of the argument as to the proper construction of the statute we have been considering. It seems to us, therefore, that the ruling of the court of common pleas was correct.

Exceptions overruled.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTIES OF HAMPSHIRE, FRANKLIN AND HAMPDEN, SEPTEMBER TERM 1840, AT NORTHAMPTON.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE,
HON. SAMUEL PUTNAM,
HON. SAMUEL S. WILDE,
HON. CHARLES A. DEWEY,
} JUSTICES.

SAMUEL WHITMARSH *vs.* HEZEKIAH WALKER, Jun.

An oral agreement for the sale of mulberry trees growing in a nursery and raised to be sold and transplanted, to be delivered on the ground where they are growing, upon payment therefor being made, is not a contract for the sale of an interest in or concerning lands, &c., within the statute of frauds — Rev. Sts. *c.* 74, § 1.

A license to enter upon land, and remove trees therefrom, passes no interest in the land, and, though not in writing, is valid, notwithstanding said statute.

ASSUMPSIT for money had and received, and on an agreement set forth, with slight variations, in different counts, but in all of them in substance as follows, viz. that in September, 1838, the plaintiff, at the defendant's request, bought of him a great number of multicaulis mulberry trees, at the rate of twenty-five cents per hill, to be delivered on the ground where they then were, on demand by the plaintiff; that the plaintiff then paid $ 10 in part of the price, and promised to pay the residue of the price on the delivery of the trees; and that, in consideration

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thereof, the defendant then promised to deliver the trees to the plaintiff on demand. A demand by the plaintiff was alleged, and also an offer of payment by him, and a refusal by the defendant to deliver.

It appeared, at the trial before *Wilde*, J. that the agreement declared on was made, but not reduced to writing; that the price of the trees was more than $50, but that the plaintiff paid $10, as alleged in the declaration; and that the trees, at the time of the agreement, were growing in the defendant's close, and were nursery trees raised to be sold and transplanted.

The defendant objected that the agreement was void by the statute of frauds. The judge overruled the objection, and a verdict was found for the plaintiff. New trial to be had if the judge erred.

Wells, for the defendant, cited *Emmerson* v. *Heelis*, 2 Taunt. 38. *Mayfield* v. *Wadsley*, 3 Barn. & Cres. 357. *Earl of Falmouth* v. *Thomas*, 1 Crompt. & Mees. 89. *Scorell* v. *Boxall*, 1 Younge & Jerv. 396. *Shelton* v. *Livius*, 2 Tyrw. 420 *Crosby* v. *Wadsworth*, 6 East, 602. Com. Dig. Biens, H. 1 Swift's Digest (ed. of 1822), 258.

Huntington, for the plaintiff, relied on *Miller* v. *Baker* (*ante*, 27) as having decided that the trees were personal property. He also cited 1 Chit. Gen. Pract. 93. 1 Ld. Raym. 182, per *Treby*, C. J. *Erskine* v. *Plummer*, 7 Greenl. 447. *Latham* v. *Atwood*, Cro. Car. 515. *Parker* v. *Staniland*, 11 East, 362. *Warwick* v. *Bruce*, 2 M. & S. 205. *Evans* v. *Roberts*, 8 Dowl. & Ryl. 611. *Smith* v. *Surman*, 9 Barn. & Cres. 561. *Bostwick* v. *Leach*, 3 Day, 484. *Benedict* v. *Benedict*, 5 Day, 478. *Newcomb* v. *Ramer*, 2 Johns. 421, *note*. *Austin* v. *Sawyer*, 9 Cow. 39. *Mumford* v. *Whitney*, 15 Wend. 380.

WILDE, J. This action is founded on a parol agreement, whereby the defendant agreed to sell to the plaintiff two thousand mulberry trees at a stipulated price; the trees, at the time of the agreement, being growing in the close of the defendant. It was proved at the trial, that the plaintiff paid the defendant in hand the sum of ten dollars, in part payment of the price thereof, and promised to pay the residue of the price on the delivery

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of the trees, which the defendant promised to deliver on demand; but which promise, on his part, he afterwards refused to perform. And the defence is that the contract was for the sale of an interest in land, and therefore void by the Rev. Sts. c. 74, § 1.

In support of the defence, it has been argued, that trees growing, and rooted in the soil, appertain to the realty, and that the contract in question was for the sale of trees rooted and growing in the soil of the defendant at the time of the sale. On the part of the plaintiff it was contended, that the trees contracted for were raised for sale and transplantation, and like fruit trees, shrubs and plants, rooted in the soil of a nursery garden, are not within the general rule, but are to be considered as personal chattels. This question was discussed and considered in *Miller* v. *Baker* (*ante*, 27), and we do not deem it necessary to reconsider it in reference to the present case. We do not consider the agreement, set forth in the declaration and proved at the trial, as a contract of sale consummated at the time of the agreement; for the delivery was postponed to a future time, and the defendant was not bound to complete the contract on his part, unless the plaintiff should be ready and willing to complete the payment of the stipulated price. *Sainsbury* v. *Matthews*, 4 Mees. & Welsb. 347. Independently of the statute of frauds, and considering the agreement as valid and binding, no property in the trees vested thereby in the plaintiff. The delivery of them and the payment of the price were to be simultaneous acts. The plaintiff cannot maintain an action for the non-delivery, without proving that he offered and was ready to complete the payment of the price; nor could the defendant maintain an action for the price, without proving that he was ready and offered to deliver the trees. According to the true construction of the contract, as we understand it, the defendant undertook to sell the trees at a stipulated price, to sever them from the soil, or to permit the plaintiff to sever them, and to deliver them to him on demand; he at the same time paying the defendant the residue of the price. And it is immaterial whether the severance was to be made by the plaintiff or the defendant. For a license for

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the plaintiff to enter and remove the trees would pass no interest in the land, and would, without writing, be valid, notwithstanding the statute of frauds.

This subject was fully considered in the case of *Tayler* v. *Waters*, 7 Taunt. 374; and it was held that a beneficial license, to be exercised upon land, may be granted without deed, and without writing; and that such a license, granted for a valuable consideration, and acted upon, cannot be countermanded. The subject has also been ably and elaborately discussed by chief justice *Savage*, in the case of *Mumford* v. *Whitney*, 15 Wend. 380, in which all the authorities are reviewed; and we concur in the doctrine as therein laid down, namely, that a permanent interest in land can be transferred only by writing, but that a license to enter upon the land of another and do a particular act or a series of acts, without transferring any interest in the land, is valid, though not in writing. And such is the license on which the plaintiff relies in the present case.

Chancellor Kent, in his Commentaries (Vol. III. p. 452, 3d ed.), very justly remarks, that "the distinction between a privilege or easement carrying an interest in the land, and requiring a writing, within the statute of frauds, to support it, and a license which may be by parol, is quite subtil, and it becomes difficult, in some of the cases, to discern a substantial difference between them." But no such difficulty occurs in the present case. The plaintiff claims no right to enter on the defendant's land by virtue of the license. It is admitted that he had a legal right to revoke his license. But if he exercised his legal right in violation of his agreement, to the plaintiff's prejudice, he is responsible in damages. We think it therefore clear that, giving to the contract the construction already stated, the plaintiff is entitled to recover. If, for a valuable consideration, the defendant contracted to sell the trees and to deliver them at a future time, he was bound to sever them from the soil himself, or to permit the plaintiff to do it, and if he refused to comply with his agreement, he is responsible in damages.

Judgment on the verdict.

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JOHN C. LYMAN & others, Executors, *vs.* ITHAMAR CONKEY.

A surety in a bond given by a guardian, on his appointment, for the faithful discharge of his trust, is not liable thereon for a breach of the guardian's duty in respect to the sale of the ward's real estate, and the application of the proceeds of the sale, when such sale is made pursuant to a license under the statute of 1783, *c.* 32, § 5, upon the ground that it will be for the ward's benefit that the estate should be sold, and the proceeds be put at interest.

Where a surety in such bond was appointed judge of probate, and in that capacity decreed an allowance of the guardian's general account, in which the guardian charged himself with the proceeds of the ward's real estate; it was held, in a suit on the bond against such surety, that he was not precluded, by his decree, from showing, in defence, that the said charge was in fact for the proceeds of real estate sold by the guardian under a license to sell it, and an order to put the proceeds at interest, for the benefit of the ward.

Before the revised statutes went into operation, a judge of probate had no authority to license a guardian to sell the real estate of a ward for his benefit, in order to put the proceeds at interest. [But see *St.* 1830, *c.* 45.]

No guardians, besides those of minors, can now be, (or ever could be,) lawfully authorized to sell their wards' estate, and place the proceeds at interest, without the previous written consent of the overseers of the poor of the town in which the wards reside.

DEBT on a bond given in 1825 to the late judge of probate for the county of Hampshire, by Asahel Thayer, as principal, and the defendant as surety, on the appointment of said Thayer as guardian of Dolly Baggs, a person *non compos mentis*. One of the conditions of the bond was, that said Thayer should render a just and true account of his guardianship, and should pay and deliver, or return, so much of his ward's estate as should be found remaining upon his account after examination and allowance thereof by the judge of probate. A breach of the latter clause of this condition was assigned in the declaration.

The judge of probate, to whom the bond was given, resigned his office, and the defendant was appointed his successor, before this action was commenced; and it was therefore brought, pursuant to the statute of 1838, *c.* 184, in the name of the former, and, upon his decease while it was pending, was prosecuted by his executors.

The parties agreed to the following facts, subject to all objections to the competency or sufficiency of any portion of them as evidence:

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Said Asahel Thayer was appointed guardian as above mentioned, in August, 1825, and gave bond, in the usual form, and with the condition (among others) above set forth; and the defendant was one of the sureties on said bond: In 1833, said Thayer presented a petition to the judge of probate for leave to sell and convey certain real estate of his said ward, for her benefit: Upon this petition, the judge of probate, after notice to all persons interested, licensed and empowered said Thayer to sell and convey said real estate, "first giving public notice, &c. and giving bonds, as the law requires," and ordered "that the proceeds of said sale be put at interest and secured by mortgage on other real estate, for the benefit of said ward:" Said Thayer gave bond, with sureties, conformably to said order: In November, 1837, he rendered his account of said guardianship to the defendant, who was then judge of probate, and the defendant accepted and allowed the same: In that account, said Thayer, after charging himself with various items, to the amount of $1,053·92, also charged himself thus,— "Farm sold by order of court, and possession given April 1st, 1834, — $2,200." This item in the account was the product of the sale of said real estate, pursuant to the aforesaid license. Upon the allowance of said account, the defendant removed said Thayer from his said guardianship, and appointed Park Warner to be guardian of said Dolly. Said Warner immediately demanded of said Thayer the balance of his account, and afterwards received of him a part thereof only.

Judgment to be rendered for the plaintiffs, for the balance of said Thayer's account, and interest thereon, if the defendant is liable for the proceeds of the sale of said real estate; otherwise, the plaintiffs to be nonsuit.

Forbes, for the plaintiffs.

Wells and *Dickinson*, for the defendant.

Shaw, C. J. The defendant being himself judge of probate, and successor of the late judge of probate, Hon. Samuel Hinckley, the suit was brought in the name of the latter, to whom the bond was given, pursuant to *St.* 1838, c. 184, for the use and benefit of the party interested; and the plaintiff having

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died pending the suit, the executors have now come in and been admitted as plaintiffs.

The action is brought against the defendant as surety on a probate bond given 2d August, 1825, by Asahel Thayer, on his appointment to be guardian of Dolly Baggs, a person *non compos*. It appears that in 1833 the guardian petitioned the judge of probate for a license to sell the real estate of said Dolly Baggs, upon a representation that it would be for the interest of said ward, that such real estate should be sold, and the proceeds put at interest and well secured for her benefit. Upon this representation, a license was granted by the probate court, and said Thayer was authorized to sell such real estate, first giving notice, &c., and giving bonds as the law directs; and it was thereby ordered that the proceeds of said sale be put at interest and secured by mortgage on other real estate, for the benefit of said ward.

It does not appear that the order to put out said sum on interest, secured by mortgage, was ever complied with; but it appears, that in 1837, after the appointment of the defendant as judge of probate, the guardian rendered his first and only account, in which he charged himself with $2,200 as the proceeds of real estate sold, and it is agreed that that sum constituted the proceeds of the sale, under the above mentioned license. He has also charged himself with interest on said sum. But it appears by the said account, that independently of said charge of $2,200, the guardian has accounted for all the effects of the ward which came to his hands, including the interest on the proceeds of the real estate; but if the defendant, as surety on the original guardianship bond, is responsible for the whole of the assets, including the proceeds of the real estate thus sold, then there is a considerable balance on the guardianship account, which the guardian has neglected to pay over or account for, on demand, and for which the defendant, as surety, is liable.

Two questions arise in this case; first, whether the defendant, as surety on the original guardianship bond, was liable for the misconduct of the guardian, in the sale of the real estate under

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such license, or the misapplication of the proceeds; secondly, whether he is precluded from showing the facts, as they existed, by allowing the guardian's general account, in his capacity as judge of probate, in which the guardian charged himself with those proceeds.

1. The conditions of probate bonds are regulated by the various statutes requiring them. It is to be presumed that the bonds required were actually given in this case; and therefore we may safely look to the statutes to ascertain the obligations which they have imposed.

The statute under which Thayer, the guardian, was appointed, was that of 1783, *c.* 38. The 2d section provides for the appointment of a guardian to a person *non compos*, directing and empowering such guardian to take care of the person and estate, both real and personal, of such person; to make a true and perfect inventory of the said estate, &c. Section 4th authorizes the guardian to improve the estate of the ward, to apply the income and profits, to manage, improve, and divide real estate; he is required to pay debts out of the ward's personal estate, or, in case that be insufficient, then out of the real estate, upon obtaining license therefor, and also may sell real estate for the ward's support and maintenance, under a similar license, if the income is not sufficient. Section 5th provides that such guardians shall give bond for the faithful discharge of the trust reposed in them, and more especially for rendering a just and true account of their guardianship, when required. Various other duties are prescribed, and powers conferred on guardians, by the statutes; but it is nowhere specified as amongst the general duties of guardians, to convert the real estate of their wards into personal, for their general benefit; nor have they any authority to sell real estate, even under a license for the purpose, except for the payment of debts, and for the necessary support of the ward, of which necessity and propriety the court granting the authority is to judge. The license is to be limited to that purpose; and a sufficient amount of the real estate may be sold to accomplish it, and no more.

Upon a sale for these purposes, no separate bond is required

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of the guardian, and of course the effect of the license is to convert a sufficient portion of the real estate into personal, to be placed in the hands of the guardian as assets, to meet the actual and present wants of the ward. Such assets, when thus received, go into the general guardianship account, and they are to be appropriated and accounted for, like the other assets of the estate, under the general duty of the guardian; and of course, for any breach of duty in the guardian, in respect to the conduct of such sale, and the application of the proceeds, the guardian and his sureties are liable on their bond. *St.* 1783, *c.* 38, § 4.

But two other cases are provided for, where under special circumstances, guardians may be authorized to sell real estate, the proceeds of which are not necessary for the payment of the debts of wards, or for their support and maintenance: First, where the estate consists of one messuage or tenement, so situated that a sale of part would greatly injure the whole. *St.* 1783, *c.* 32, § 2: Secondly, where it would be greatly for the benefit of the ward, that the real estate should be changed into personal, and the proceeds invested for his benefit. *St.* 1783, *c.* 32, § 5. But in both these cases, the authority is regarded as a special trust, superadded to that of guardian, and which indeed may be conferred on a person other than the guardian, the result of which will be to place a sum of money in the hands of the guardian, for special purposes, independently of the guardianship, to be separately accounted for, and to go, in some cases, differently from the general assets; and in both cases, such guardian is bound, as a condition precedent to the valid execution of the power, to give bond, with sureties, to observe the rules of law in the sale, and to invest and account for the proceeds, according to law. Various modifications of these provisions have been made from time to time. *Sts.* 1806, *c.* 102: 1818, *c.* 112: 1826, *c.* 64: 1830, *c.* 140: 1834, *c* 174, § 7. But none of these acts effectually alter this marked and distinguishing feature in the system. Whenever the object is to dispose of the real estate of the ward, to raise a fund to stand in lieu of the real estate, for the future use of the ward, or of any other person who would have been entitled to the real

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estate, it is deemed a separate special trust, for the due execution of which a separate security is required, as a condition precedent to the validity of the sale; and therefore the court are of opinion, that the accounting for the proceeds of a sale, made under such special license to sell for the benefit of the ward, is not one of the general duties of guardianship, for the performance of which the sureties on the original guardianship bond are responsible.

2. The second question is, whether it is competent for the defendant to take this ground, after the guardian has rendered his guardianship account, in which he has charged himself with $2,200, as the proceeds of the sale of the real estate, without specifying under what species of license the sale was made, and after the defendant himself, acting as judge of probate, has allowed and passed that account.

The court are of opinion that he is not precluded from showing the truth of the case. It is undoubtedly in general true, that the responsibility of the guardian for particular items and for the settlement of the whole estate, is a question of probate jurisdiction; and this court, on a probate bond, will not reëxamine and restate the probate guardianship account. But when a probate account, settled and allowed, is offered as evidence of certain facts, the question whether they prove the facts, is very different from that of the conclusiveness of the facts when proved. The guardian puts down amongst the sums, for which he charges himself, "Farm sold by order of court, $2,200." If this sale had been made under a license for payment of debts, it was rightfully a charge in his general account: If made under a special license, for changing real estate into personal, he was still bound to render his account to the judge of probate, and to charge himself; but not in his general account. It would be a special account, for which another set of sureties, under another bond, were liable. But on the face of the account, it is left entirely ambiguous, whether it was sold under the one or the other of these species of license. This being a latent ambiguity, it was competent to go into evidence *aliunde* to explain it, and the moment this evidence is let in, it is shown beyond doubt, that

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this was a sale made for the general benefit of the ward, for the proceeds of which the guardian was separately liable, and for securing which separate liability he had given another bond. The decision in this case contradicts nothing contained in the probate account; it may be, and no doubt is true, that the guardian had sold the real estate of his ward, under a license of court, and that he was accountable for the proceeds; but it is quite consistent with that admission, that it was a sale for which neither the guardian nor his sureties were liable under this bond.

And the same consideration applies to the estoppel urged against the defendant, in consequence of his having allowed the said account, in his character of judge of probate, if indeed he had jurisdiction of the subject, of which there is great doubt. Rev. Sts. c. 83, § 15. The judge would be estopped only as far as the account, acted upon by him, stated explicitly the fact upon which he now offers proof. It does not appear on the face of the account, whether the item of charge, $ 2,200, was the proceeds of the sale of real estate, made under a special license for the benefit of the ward, and to be put out on interest, or whether it was sold under a license for the payment of debts. Nor is he estopped by the fact of the accounting for these proceeds, because, in either case, the guardian was bound to account, and to account with the judge of probate. The fact of accounting was consistent with either hypothesis. It was left wholly ambiguous on the account, and it was a latent ambiguity. We think, therefore, that as all estoppels are to be construed strictly, the defendant was not estopped by the mere fact, that this item was inserted in the general account. Whether it was properly chargeable in that account depends, not upon the place where it is found, but upon the terms in which it is expressed, and the facts thereby stated, which determine the nature of the liability. Suppose the item had expressly been a credit to the ward, for $ 2,200, the proceeds of land sold under a special license, describing it in detail, and upon the obtaining of which, a separate bond was given. As it would then appear upon the face of the account, that it was a sum, for which the sureties on the general

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bond were not liable, the fact that it was included in the same schedule with items for which they were liable, would not render them liable for it. We think the entry, as it stands, involving a latent ambiguity, and therefore capable of explanation, when explained by showing the truth of the fact, has the same legal effect upon the responsibility of those respectively who are collaterally liable on their respective bonds for the different duties of the guardian.

This case has been argued on both sides, as if it were beyond doubt that the sale made by the guardian, in 1833, was valid; and perhaps it could not be properly drawn in question in this suit. But lest it might be supposed that the court intended to sanction such an opinion, and because it has been stated in behalf of the ward, that if she cannot maintain this suit, she is without remedy, the sureties on the other bond being insolvent, it may be proper to suggest at least a doubt whether the validity of that sale can be supported. First, because, until the revised statutes went into operation, in 1836, after the license in question, the judge of probate had no authority to grant license to a guardian to sell real estate, for the benefit of the ward, in order to put out the proceeds on interest; and secondly, because both before and under the revised statutes, the court were not authorized to grant license to a guardian to sell the estate of a ward, other than a minor, to place the proceeds out at interest, without the previous consent and approbation in writing, of the overseers of the poor of the town where such ward shall reside. *Sts.* 1818, *c.* 112: 1830, *c.* 140, § 1. Rev. Sts. *c.* 72, § 8. Unless there was some statute in force in 1833, which we have overlooked, it would seem that the sale in question would be void upon both grounds. Perhaps there may have been a written approbation of the overseers of the poor, though it does not appear amongst the proceedings, which would obviate that difficulty. The question, however, whether the sale is valid, is not before the court, and they give no opinion upon it; and these remarks are added merely to avoid any misconstruction upon that point. [But see *St.* 1830, *c.* 45.]

Plaintiffs nonsuit

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JOSEPH M. LEGATE *vs.* SAMUEL POTTER & another.

Mortgaged goods were attached by a creditor of the mortgagor, and were sold on the writ, within a week, by consent of the parties to the suit. Before the sale, the mortgagee gave notice of his claim to the officer and creditor, and forbade the sale. The officer replied that he had seen the record of the mortgage, and knew all about it. The mortgagee, about four months afterwards, demanded of the officer and creditor payment of the sum for which the goods were liable to him, and delivered to them a written account of the debt due to him from the mortgagor. On their refusal to pay, he commenced an action of trover against them, which was sustained by the court.

TROVER for a wagon and a hive of bees. The following facts were submitted to the court by the parties:

On the 10th of January, 1840, the property in question was mortgaged to the plaintiff by Thomas Flagg, to secure payment of a note of that date, made to him by the plaintiff, for $20·50, payable "by the first day of July" then next, and the mortgage was duly recorded. On the 5th of February, the defendant, Potter, a deputy sheriff, attached said property on a writ sued out by Ballard, the other defendant, against said Flagg, and sold the same on the writ by consent of the parties thereto, within a week after the attachment. Before the sale, the plaintiff was informed that the attachment had been made, and gave the defendants notice of his claim, and also, in their presence, forbade the sale. On the 10th of June, and before the commencement of this action, the plaintiff demanded of the defendants payment of his note, and made to them a statement of his demand, in writing. When the plaintiff gave notice of his claim, and forbade the sale, the defendant, Potter, said he had "seen the record of the mortgage, and knew all about it."

A nonsuit or default to be entered, according to the opinion of the court on the foregoing facts.

Grennell and *Aiken*, for the plaintiff.

Wells and *Davis*, for the defendants.

DEWEY, J. The right to attach the personal property of a debtor, which he has conveyed in mortgage, is conferred by statute, upon the condition that the attaching creditor shall pay

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or tender to the mortgagee of the property attached, the amount for which it is liable, within twenty-four hours after the same is demanded. It is also further provided, that the mortgagee, when demanding payment of the money due to him, shall state, in writing, a just and true account of the debt or demand for which the property is liable to him. Rev. Sts. c. 90, §§ 78, 79. As this right of attachment is not connected with a precedent but a subsequent duty to be performed by the attaching creditor, and only upon demand of the mortgagee; it would seem that if the mortgagee would preserve his lien on the property, he ought, within a reasonable time, to make a demand and give the proper statement of the amount he claims, and if guilty of laches, in this respect, he may lose all the benefits of his mortgage.

The statute has prescribed no time within which the demand shall be made, and the account stated. It was suggested, in the argument for the defendant, that inasmuch as the statute provides that in case of the failure of the attaching creditor to pay the amount of the incumbrance within twenty-four hours after demand of the same, "the attachment shall be dissolved, and the property shall be restored" to the mortgagee, the fair inference is, that the demand must in all cases be made while the property is in the hands of the officer and might be by him restored to the mortgagee. But we think this cannot be the true construction of the statute. Such a rule, if adopted as an inflexible one, would occasionally operate with great injustice to a mortgagee who might have acted in entire good faith, but wholly in ignorance of any attachment of the property. The duty of making the demand before the sale will therefore depend upon the time that elapses between the attachment and the sale, and other circumstances which the case may disclose. The only general rule, therefore, seems to be that of reasonable diligence, on the part of the mortgagee, in asserting his lien and giving the proper notice thereof. (See *Ante*, 294.)

What is reasonable diligence will depend, in some degree, upon the circumstances peculiar to each case. While, on the one hand, early knowledge, on the part of the mortgagee, that

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the property has been attached, will require more speedy assertion of his rights; so, on the other hand, if the attaching creditor, or the officer, has, through the mortgagee, though informally, actual knowledge of the mortgage, and the nature and extent of the lien acquired thereby, this fact will be entitled to some consideration on the question whether the mortgagee has lost his lien by unreasonable delay in making that formal demand and statement of his claim, which the statute requires.

The present case discloses early knowledge of the attachment on the part of the mortgagee, and so far falls within the rule requiring speedy action by him in disclosing his interest in the property attached; and if, with this knowledge, he had studiously concealed the fact of his mortgage, and had delayed, for any great length of time, to make a demand and present a written statement of the amount of his claim; and if, in the mean time, the property attached had been sold on execution; these facts might constitute a bar to his claim as mortgagee, if he should subsequently institute a suit to recover damages of the officer for taking the mortgaged property.

But while the case discloses the mortgagee's knowledge of the attachment, it also shows substantial notice to the attaching officer, of the plaintiff's lien, before the sale of the property, and within a week after the attachment. It appears in the facts stated by the parties, that before the sale, the plaintiff gave notice of his claim and forbade the sale, and that, on this occasion, the attaching officer, replied that "he had seen the record of the mortgage, and knew all about it." And upon looking at this mortgage, it seems to be peculiarly a case where such inspection of the record could not fail to apprize the party of the nature of the lien, and the probable amount due thereon; as it was a mortgage given to secure the payment of a small note, to be paid at a time not then elapsed.

We think these acts of the plaintiff, accompanied with knowledge of the mortgage admitted by the officer, are entitled to great consideration on the question of the mortgagee's laches in not sooner making that particular and formal demand and statement of the amount for which the property was liable to him,

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which the statute requires before the mortgagee can reclaim the property, or demand the value thereof.

In the recent case of *Johnson* v. *Sumner*, (*ante*, 178,) the question as to what may be regarded as a reasonable time for demanding payment of the money due, and stating an account by the mortgagee, was somewhat considered by the court. In that case, there was a delay of thirteen months before the making of a proper demand. But the court held, that although this delay, unaccompanied with any circumstances to account for and excuse it, would be unreasonable, yet it might be explained and excused, and did not necessarily operate to defeat the claim of the mortgagee. The fact was there much relied upon, that "there was an early although informal demand, but sufficient to inform the officer and attaching creditor of the existence of the plaintiff's mortgage, and put them on inquiry."

In the case at bar, the demand, required by the statute, was made a little more than four months after the attachment; but it had been preceded, at a very early day, by substantial notice of the claim, certainly quite enough to put the other party on inquiry, and to save the mortgagee from the imputation of intentional concealment of his lien. The court are therefore of opinion that the demand was made by the mortgagee within a reasonable time, and that he is entitled to judgment.

Defendants defaulted

ZADOCK KING *vs.* ISRAEL WHITCOMB.

Where the only defect in a warrant, issued by assessors to a collector of taxes, is an omission to direct him to sell distrained goods within seven days, he is justified, by such warrant, in distraining goods, and selling them within seven days, according to law.

A demand, by a collector, of payment of a tax assessed on a non-resident, who has no agent or attorney within the Commonwealth, is sufficient to justify a subsequent seizure and sale of his goods, if such demand be made at his last and usual place of abode in the town where he is taxed.

IN an action of trover, the defendant justified the taking and sale of the property, as collector of taxes, under a warrant.

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dated July 14th, 1837, and directed to him by the assessors of the town of Florida. The plaintiff was taxed by said assessors, in 1837, as a non-resident. The warrant contained this direction — "if any person shall refuse or neglect, upon demand by you made, to pay the sum he is assessed in said list, you are to distrain the goods or chattels of such person, to the value thereof, and the distress, so taken, to keep for the space of four days, at the cost and charges of the owner, and if he shall not pay the sum so assessed, within the four days, then you are to sell openly, at public vendue, the distress so taken, for the payment thereof with charges, first giving forty-eight hours notice of such sale, by posting up advertisements thereof in some public place in said town, which said notice may be given either before or after the said four days shall have expired," &c.

The defendant, in his return on this warrant, stated that on the 23d of October, 1837, he, by virtue thereof, took and distrained the property in question, for the payment of said tax, having previously demanded the payment thereof at the last and usual place of abode of the said King, in said Florida, and not being able to find said King within his precinct, he, on the 28th of October, advertised the property to be sold at public vendue on the 30th day of the same October, at 10 o'clock, A. M., by posting up notice of the time and place of said sale, at a public place in said town of Florida, at least forty-eight hours before the time of said sale; and at the time and place appointed for said sale, the said King having failed to pay said tax, he (the defendant) sold said property, at public vendue, to the highest bidder, &c.

The plaintiff was a non-resident when the tax was assessed, and ever after, and had no known agent or attorney within the Commonwealth.

The questions presented to the court were, *first*, whether the assessors' warrant was such as to justify the defendant's proceedings; and *secondly*, whether there was a legal demand of payment by the defendant before he distrained the plaintiff's property.

Wells and *Davis*, for the plaintiff. The Rev. Sts. c. 7

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§ 33, require that the assessors' warrant shall specify the collector's duties, as prescribed by law, in the collection of taxes. Those duties are thus prescribed in c. 8, § 8 — "the collector shall keep the goods distrained, for the space of four days, at the least, and shall, within seven days after the seizure, sell the same, &c., having given notice of such sale, &c. forty-eight hours at least before the sale." The warrant, in this case, did not direct the defendant to sell distrained property within seven days, and was therefore illegal, and the defendant cannot justify under it. *Toof* v. *Bently*, 5 Wend. 277. *Brewster* v. *Hyde*, 7 N. Hamp. 211. *Watson* v. *Watson*, 9 Connect. 146. *Sandford* v. *Nichols*, 13 Mass. 288. *Colman* v. *Anderson*, 10 Mass. 105. 1 Saund. 298, *note* (1). *Porter* v. *Haskell*, 2 Fairf. 178. *Cutler* v. *Wadsworth*, 7 Connect. 6. *Washington* v. *Sanders*, 2 Dev. 343.

If the form of the warrant was legal, and authorized a seizure of the goods, it did not justify a sale after *six* days. *Pierce* v. *Benjamin*, 14 Pick. 360.

The defendant made no such demand on the plaintiff as the Rev. Sts. c. 8, §§ 3 & 19 require; and cannot, therefore, justify his proceedings.

H. G. Newcomb, for the defendant. The defendant proceeded in exact conformity to law, in the seizure and disposition of the goods, and in entire consistency with his warrant; and therefore stands justified. He also made all the demand, before seizure, which the state of the case would permit.

Dewey, J. The plaintiff seeks to recover damages for the wrongful conversion of his property, and the inquiry as to his right to maintain his action raises the question whether the proceedings of the defendant as a collector of taxes, in distraining and selling the goods of the plaintiff, were authorized by law.

1. It is objected to the validity of the sale, that the warrant of the assessors to the collector was substantially defective, and not according to the directions of the tax acts. Rev. Sts. c. 7, § 33, and c. 8, § 8. The alleged defect is the omission to specify fully, in the warrant, all the provisions of c. 8, § 8, regulating the distraining of goods for taxes, prescribing the

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time such goods shall be kept, the mode of advertising, and limiting the time within which they must be sold.

The assessors undoubtedly used, as their guide in making their warrant, the form in common use before the enacting of the revised statutes, and one conforming to the previous statutes. In the earlier *Sts.* 1785, *c.* 70, § 2, and 1791, *c.* 22, § 2, directing the mode of proceeding in cases where property was distrained by a collector, the provisions were much the same as at present, except that there was no such express limitation of the period of seven days within which goods distrained were to be sold, as is found in the revised statutes; but it was provided that if the taxes should not be paid within four days after the seizure, *then* the collector should sell at public auction, first giving forty-eight hours notice, &c.; which notice, by said statute of 1791, might be given within the four days. The construction given to those statutes, and to the warrants issued in conformity with them, has been, that the sale must take place within six days after the seizure; that being the most remote period to which the sale could be delayed. The only omission, therefore, in this warrant, which is supposed to be material, is as to the provision requiring the sale to be made in seven days after the seizure.

It is unnecessary to decide what would be the effect of a warrant directing proceedings by the collector contrary to law, and whether, under such a warrant, a collector could justify a seizure and sale of property upon showing that he had, in disregard of his warrant, in fact pursued the provisions of the statute. The warrant in the present case is liable to no such objection. Its defects, if any, are those of omission. But the duties enjoined by the revised statutes were wholly observed in the execution of this warrant, and all the proceedings of the collector were in entire accordance with them, and they might well be so, and yet conform to the warrant in the discharge of all duties therein prescribed.

We do not perceive any such defect in this warrant as should render the proceedings under it void or illegal. I am aware that it is said, on the part of the plaintiff, that if this warrant

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might have authorized a seizure, yet, under the construction heretofore given to such warrants, it would not authorize a sale on the seventh day after such seizure. But it seems to us that the construction given to such warrants, under the former statutes, in which there was no direct enactment limiting the number of days within which the sale should be made, does not now apply; certainly not with the same force. That which was, before the revised statutes, left to construction, is now made certain and plain by express words. The statute having fixed seven days after the seizure as the time within which the sale must be made, we think that it was competent for the collector, under this warrant, to sell the property within that period. In thus doing, he conforms to the requirements of the statute, and deprives the party of no privilege secured to him by law.

2. It is further objected, that there was no demand of payment of the tax before making the distress. The provisions of the Rev. Sts. c. 8, § 3, are that "the collector shall, before distraining the goods of any person for his tax, demand payment thereof of such person if to be found within his precinct." But the case finds that the plaintiff was a non-resident, having no agent or attorney to act for him; and the collector certifies, in his return, that he demanded the payment of the tax, at the last and usual place of abode of the plaintiff, in Florida, and not being able to find him in his precinct, he afterwards seized the property, &c. This was all the demand the officer could properly make, and, as it seems to us, was all that the statute requires in the case of a non-resident.

Judgment for the defendant.

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RICHARD E. NEWCOMB, Judge, &c. *vs.* NOAH GOSS & others.

If an administrator suffers judgment to be recovered against him before he represents the deceased's estate insolvent, he must pay the full amount of such judgment, without regard to the assets of the deceased. And if, on demand made upon him to pay such judgment, or to show sufficient property of the deceased to be taken in execution to satisfy the same, he neglects or refuses so to do, he and his sureties are liable, on his administration bond, to a suit by the judgment creditor, in the name of the judge of probate, although the deceased's estate is in fact insolvent.

DEBT on a probate bond executed by the defendants, in March, 1837, upon the appointment of Goss, the principal obligor, as administrator of the estate of Amos Wilmarth.

At the court of common pleas held in the county of Franklin, on the second Monday of August, 1840, John Williams recovered judgment against said Goss, administrator as aforesaid, in a suit brought more than a year after the date of said bond, and, having sued out execution thereon, made an ineffectual demand on him to pay the same, or to show sufficient goods or estate of the intestate, to be taken in execution for that purpose. This action was thereupon brought, for the benefit of said Williams; and upon the day of the service of the writ, and after the service, said Goss caused the estate of said Wilmarth to be represented insolvent; and commissioners were appointed to receive and examine the claims of creditors against said estate. There would have been no reason to suppose said estate to be insolvent, if said Williams had failed to support his said action against the administrator.

Brooks, for the plaintiff. The Rev. Sts. *c.* 70, § 3, expressly authorize this suit; and the administrator cannot now be allowed to deny that he has assets to satisfy the judgment against him. The question of insolvency should have been tried in the original action, on a plea of *plene administravit* which might have been traversed. Rev. Sts. *c.* 66, §§ 10 – 13. *Ruggles* v. *Sherman*, 14 Johns. 446. *Erving* v. *Peters*, 3 T. R. 689. *Rock* v. *Layton*, 1 Ld. Raym. 589. *Ramsden* v. *Jackson*, 1 Atk. 292. *Shaw* v. *McCameron*, 11 S. & R. 252. *U. States* v *Hoar*, 2 Mason, 311. *Stubbs* v. *Rightwise*, Cro. Eliz. 102.

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Ferrewest v. *Featherby*, 2 Meriv. 480. *Barton* v. *White*, 21 Pick. 58.

Grennell and *Aiken*, for the defendants. The Rev. Sts. *c.* 68, § 2, do not limit the time of representing an estate to be insolvent; and an administrator may do it after a year has elapsed, though no additional claim is presented after that time He may believe that he can defend against a claim; and after failing in his defence, he ought not to be obliged to pay all the debts without assets. Yet by Rev. Sts. *c.* 70, § 10, the plaintiff must recover in full, if this action can be maintained. But the 3d and 5th sections of that chapter authorize a suit, in the name of the judge of probate, without his leave, only where the estate is solvent, and the administrator's liability is found by judgment or decree of distribution. It is the 4th section only that authorizes such suit where the estate is insolvent. *Barton* v. *White*, 21 Pick. 58.

PUTNAM, J. The general provisions of the law for the settlement of the estates of persons deceased, regulating the duties of executors and administrators, and the rights or claims of creditors, are very clear. Executors and administrators are to give notice of their appointment in the manner prescribed by the Rev. Sts. *c.* 66, § 1. They are not held liable to answer to the suit of any creditor, if commenced within one year after they give bond for the discharge of their trust, unless it be for recovery of a demand that would not be affected by the insolvency of the estate. And if, within the year, they shall not have notice of demands against the estate, which will authorize them to represent it insolvent, they may proceed to pay the debts due, without any personal liability, on that account, to any creditor who shall not have given notice of his claim, although the estate remaining should be insufficient to pay it. If, in such course of administration, they shall have paid out the whole estate before notice of a claim subsequently presented, they may plead that they have fully administered, and be discharged. Or, if any effects remain, they may proceed to represent the estate insolvent, where there are two or more claimants whose demands the remaining effects are not sufficient to pay in full, and pay

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pro rata according to some order or decree of distribution thereafter made. Rev. Sts. *c.* 66, §§ 10 – 13. Thus the executor or administrator has ample opportunity to ascertain whether the estate is insolvent or not. He is not to wait until the claims of creditors are proved at the law before he makes his representation of insolvency. He may believe that there is a good defence against a claim that is presented to him; but if its recovery would cause insolvency, he should represent the estate insolvent.

But after the expiration of the year, the creditors may enforce their claims by suits. And in the case at bar, the creditor commenced his suit after the year, and there was no representation of insolvency until after he had recovered judgment, taken out execution, and made an ineffectual demand of payment on the administrator. There has been, then, an obvious breach by the administrator of the condition of his administration bond. For having had full opportunity to ascertain the situation of the estate, in respect to its solvency, and having had knowledge of the claim of Williams, and having litigated it with him until final judgment, the law will suppose that he has the means in his hands to satisfy it, inasmuch as he had not made any representation to the contrary. If an executor or administrator shall suffer in his property by reason of his neglecting to comply with the reasonable provisions of the law, he must ascribe the loss to his own carelessness. *Erving* v. *Peters*, 3 T. R. 689. *Platt* v. *Robins*, 1 Johns. Cas. 278.

The case at bar comes within the Rev. Sts. *c.* 70, § 3; viz. "the bond given by executors or administrators, for the discharge of their trust, may be put in suit by any creditor of the deceased, for his own benefit, when he shall have recovered judgment for his debt against the executors or administrators, and they shall have neglected, upon demand made by the creditor, to pay the same, or to show sufficient goods or estate of the deceased, to be taken in execution for that purpose." It has been contended for the defendants, that this section applies only to estates which are solvent; whereas, in the present case, the estate is insolvent. But the defendants cannot be permitted

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to say that the estate was insolvent at the time when the judgment was rendered against the administrator. He had then made no representation to that effect. He might have done so; and if, pending such representation of insolvency, a judgment had been recovered, the amount thereof would have been laid before the commissioners for allowance. But no such proceeding was had; and it is too late, after judgment against him, for the administrator to make a representation of insolvency so as to prevent the judgment creditor from obtaining the full amount of his judgment.

Judgment for the plaintiff.

INHABITANTS OF WHATELY *vs.* COUNTY COMMISSIONERS OF FRANKLIN.

Where a town has due notice of the application of individuals to the county commissioners for the alteration of a road within the town, alleged, in such application and in all the procedings thereon, to be a highway, and also has due notice of the proceedings of the commissioners in directing specific repairs to be made on said road by the town, and does not object that said road is a town way and not a highway, until after the commissioners have caused such repairs to be made, upon the neglect of the town to make them as ordered, and after the town is served with notice to show cause why a warrant of distress should not issue against the inhabitants of the town for the collection of its proportion of the expense of such repairs; a writ of *certiorari* will not be granted to remove the records of the commissioners, on the ground that the road was a town way, and that they therefore had no jurisdiction. Nor will a writ of prohibition be granted to restrain the commissioners from issuing such warrant of distress.

PETITION for a writ of prohibition. It was alleged in the petition, that the county commissioners of Franklin (the respondents), on the 25th of April, 1838, ordered the inhabitants of the town of Whately (the petitioners) to make certain specific repairs on a road in said town, asserted by the respondents to be a public highway or county road: That the petitioners never appeared before said commissioners in any of the proceedings which resulted in said order, nor at the time when said order was made: That said commissioners, on the first Tuesday of March, 1840, issued an order to the petitioners, reciting

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that they had neglected to make said repairs, and that the commissioners had therefore caused them to be made and paid for by the county, and directing the petitioners to appear before said commissioners on the second Tuesday of June then next, to show cause why a warrant should not issue against them for the sum thus expended by the county, with ten per cent. interest and cost thereon: That the petitioners appeared before said commissioners at the time aforesaid, and that the process was continued from time to time until the 7th of September, 1840, when the petitioners offered to show, as cause why said warrant should not issue, that the said road was not a county road, but a town road, and that said commissioners had no jurisdiction thereof: That the petitioners then produced and offered evidence to prove that said road was a town road, which evidence the said commissioners refused to receive; and that the commissioners also refused to grant to the petitioners a continuance, which they requested, to enable them to procure further evidence in the premises, but directed that a warrant of distress, as aforesaid, should issue against them.

For these causes, the petitioners prayed that the court would "issue its writ, prohibiting and restraining the said commissioners from issuing said warrant, and superseding and inhibiting the further service of said warrant, if already issued, until the legality of their proceedings, in directing said repairs, and their right by law to issue such warrant, shall be determined upon a petition for *certiorari*, which these petitioners have made to this court, returnable at the April term, 1841, at Greenfield." The petitioners also averred, that upon the hearing of said petition for a writ of *certiorari*, they expected "to prove that said road was a town road; that evidence to this effect was improperly excluded by said commissioners; and that said commissioners assumed jurisdiction of said road without ever having had any evidence of their right to jurisdiction over the same."

To this petition the respondents filed an answer, in which they set forth all their proceedings in the premises, from the commencement thereof to the time of their ordering said war

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rant of distress. The facts contained in this answer sufficiently appear in the opinion of the court.

The provision of the Rev. Sts. c. 24, § 7, on which this question arose, is this : " Whenever upon *any* petition for laying out or altering a *highway*, the commissioners, after having viewed the same, and heard all persons interested, shall be of opinion that the existing highway between the termini mentioned in the petition, can be so far amended, as to supersede the necessity of laying out a new highway, or altering the location of existing ways, they may, after due notice to the towns interested, direct specific repairs to be made in such existing ways, in such manner as the public convenience shall require ; and they shall apportion the expense thereof upon the county and towns, respectively, as in the case of *laying out* highways."

Wells and *Davis*, for the petitioners.

Grennell and *Aiken*, for the respondents.

Dewey, J. This case comes before us upon a petition from the inhabitants of Whately, praying for a writ prohibiting the respondents from issuing, or, if they have already issued, from enforcing, a warrant of distress against the petitioners for the amount of certain expenditures made under the order of the respondents, in the amendment and repair of a certain road in the town of Whately. The ground of the application is, that the proceedings of the respondents, which are the foundation of the warrant of distress, and the only authority upon which it can be justified, were erroneous and illegal, and such as this court would quash, if brought before them on a writ of *certiorari*. The substantial inquiry is, therefore, whether on a petition for a *certiorari*, this court would order a writ of *certiorari* to issue, and, upon its return, would vacate the proceedings of the county commissioners.

The application for a *certiorari* is always addressed to the sound discretion of the court. It is to be granted, not as a matter of right, for the purpose of enabling a party to reverse proceedings for mere errors of form, or technical objections, but only where substantial injustice has been done to the party seeking redress. The time also of making the application for

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a *certiorari*, and the whole circumstances of the case, and particularly the consequences resulting from a reversal of the proceedings, have a material influence upon the action of the court in such cases. While the parties are so situated that the proceedings may be quashed and the parties be left substantially as before the institution of the proceedings, the court will more readily authorize the record of the proceedings of an inferior tribunal to be brought before them, and subjected to a strict legal scrutiny. But, as a general rule, applications for a *certiorari* are not to be granted where a party, with full knowledge of the course of the proceedings, by his own laches, has neglected to avail himself of the proper opportunity to arrest the action of the inferior tribunal, while the case was in its incipient stages, and before any mischievous consequences would result from setting aside the proceedings. The parties are not to lie by and permit great expenditures to be incurred thereby, the benefits of which they will, to some considerable extent enjoy, and then avoid all responsibility for the payment of those expenditures, by quashing those proceedings, under which the expenditures were ordered.

The effect of a waiver of exceptions to the validity of proceedings, which might otherwise have been successfully insisted on, through neglect to urge them at the proper period, is of familiar application in all petitions for *certiorari*, and particularly so in cases of exceptions taken to the laying out of highways. Thus, in reference to the subject of notice to the town interested in the proposed location of a highway, although there had been a plain and obvious defect, in not complying with the statute provisions as to notice of the time of making the location, yet it was held that this defect might be waived by the conduct of the party interested, and that, in such case, it was too late to take the exception after the road was actually made, and heavy expenditures had been made. *Rutland* v. *County Commissioners of Worcester*, 20 Pick. 71. Upon a similar application for a *certiorari* in the case of *Freetown* v. *County Commissioners of Bristol*, 9 Pick. 51, the court say "towns or individuals whose interests may be affected by the opening of a new

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road, ought not to lie by and withhold their objections until great expense has been incurred, and then apply to this court to rip up the whole proceedings." In both these cases, as in the case at bar, the road had been already constructed at great expense, and manifest injustice would result from quashing the proceedings, as the parties could not be placed *in statu quo*. So also if one of the commissioners, who acts in laying out a highway, be disqualified by his place of residence, or by reason of an interest in the subject matter, and a party, knowing this fact, does not take the exception until after the road is established, this is a waiver of the objection. *Ipswich* v. *County Commissioners of Essex*, 10 Pick. 519; and the same principle has been applied to the case of exceptions to the competency of the officer presiding in a hearing before a jury called to revise the doings of the commissioners. *Merrill* v. *Inhabitants of Berkshire*, 11 Pick. 269.

Upon recurring to the facts disclosed by the petition and the answer of the respondents thereto, it appears that the county commissioners of Franklin, on the application of sundry persons, of whom a large number were inhabitants of Whately, representing that a certain county road in said Whately, particularly described in the application, needed alteration or amendment, appointed a time and place for viewing the road and hearing all parties interested; having first given notice to the town of Whately, in the manner prescribed by law, by a service of a copy of the petition on the town clerk, and by posting up copies of the same in two public places in said town. The meeting of the commissioners was, agreeably to the notice, held in the town of Whately, for the purpose of hearing the parties and adjudicating upon the prayer of the said petitioners for the alteration or amendment and repair of said road. At this meeting, although many of the inhabitants of Whately, and among them one or more of the selectmen, were present, yet no objection was made to the authority of the commissioners to adjudicate on the subject of the petition, nor any question raised before them, by the town of Whately or any of its inhabitants, as to the fact, alleged in the application to them, that the road, upon which

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these amendments and repairs were asked, was a county road, though in the notice served upon said town, and in the public notices posted up in said town, it was described as a county road or public highway, and, as such, the commissioners were requested to order amendments and repairs upon it.

After the view and hearing under this order of notice, the commissioners, at their next regular meeting, adjudicated that the public convenience required that certain specific repairs should be made in said highway, and appointed a time and place for proceeding to specify and direct the nature and extent of said repairs; of which meeting, and the purpose thereof, due notice was given to the town of Whately, and in this notice the road was again described as a county road or public highway. At this meeting, which was also held in the town of Whately, and at which were present two of the selectmen of said town, no objection was interposed to the commissioners' proceeding to specify and direct the amendments and repairs to be made on said road, upon the ground that said road was a town way and therefore not within the jurisdiction of the commissioners, under the petition which had been presented. Nor did the town of Whately, at the next meeting of the commissioners, when the proposed amendments and repairs were finally adjudicated upon and ordered, appear and object to said adjudication. It also further appears that in pursuance of said adjudication and order of the commissioners, said town proceeded to make the amendments and repairs upon one of the three sections of said road, upon which repairs were ordered to be made; and it was not until after the commissioners had, in pursuance of the Rev. Sts. c. 24, § 44, in consequence of the neglect of the town to make said repairs on the two remaining sections of said road, caused the same to be made under their direction, and the expenses thereof to be paid from the county treasury, that said town or any of its inhabitants made the objection now taken, that the road, thus amended and repaired, was a town way, and that, for this cause, the town was not liable to be charged with the expenses incurred in making the said repairs.

The facts here stated certainly show great laches on the part

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of the inhabitants of Whately in not raising the objection, now presented, before the commissioners had made their adjudication granting the prayer of the petitioners for these repairs, and before heavy expenditures had been made under said adjudication; and such laches as should, within the principles already stated, debar them from asking the aid of the court to arrest the proceedings in this stage, unless there has been such an obvious want of jurisdiction of the subject, in the tribunal whose proceedings we are called upon to annul, as to excuse all laches, and to justify the town of Whately in entirely disregarding all the mandates of the commissioners in reference to it, in the earlier stages of the case.

The further inquiry then is, whether the commissioners had such a case before them as would authorize them to entertain jurisdiction thereof. The petitioners for the writ of prohibition insist that the commissioners had no such jurisdiction, inasmuch as the provision of the Rev. Stats. c. 24, § 7, under which this application was made to them, applies only to county roads or public highways, and not to a town way, which they allege this to have been.

If the original petition, which was the foundation of all the subsequent action of the commissioners, had described the road as a town way, and had requested the commissioners to direct amendments and repairs upon the same, under the description of a town way, and thereupon the commissioners had directed the proceedings now complained of and sought to be reversed, the case would have been, on the face of it, one foreign from their jurisdiction; and this objection might be well urged, perhaps, at all times, by those whose rights were affected by such proceedings. But it is to be remembered that, in the case before us, the petition to the commissioners represented "that the county road in Whately, leading &c. needed reparation and alterations," and prayed that the commissioners would proceed to order the same. It was upon a petition for the amendment of this road, thus described and alleged to be a "county road," that jurisdiction was assumed by the commissioners, and an order of notice issued. In the notice served upon the clerk of the

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town of Whately, and in the notice posted up in two public places in that town, requiring the inhabitants thereof to show cause why the prayer of said petition should not be granted, it was described as a county road. It was upon this petition for the amendment of a county road, that the commissioners subsequently adjudged that the public convenience required certain amendments, and ordered a further notice of the time and place appointed for their proceeding to direct the specific repairs to be made; and in the service of this notice upon the inhabitants of Whately, the road was again described as a county road; and in the entire proceedings on the part of the commissioners, it has been described and acted upon as a county road or public highway. The commissioners, therefore, having this apparent jurisdiction of the case, if the town of Whately would have arrested their further proceedings upon the same, on the ground that this was a town way, and, as such, not under their supervision, except upon *application made by said town*, as provided by the Rev. Sts. *c.* 24, § 9; it was the duty of the town to have presented this objection, before the commissioners had proceeded to adjudicate upon the question of the expediency of ordering amendments, and directing the specific amendments, or, at least, before those amendments had been in fact made. It was a preliminary question, and one which might properly have been raised by the town; and if thus raised, and sustained by the facts, would have required the commissioners to dismiss the petition; or if, upon the preliminary question, they had decided erroneously in matter of law, this court would, upon the proper application, have corrected the error. But the inhabitants of Whately, being in the first instance duly cited to appear and show cause why the prayer of the petition for the amendment of the road should not be granted, and being subsequently notified to appear at the time appointed for adjudicating and directing the specific repairs, they were substantially called upon to deny the allegation of the petitioners that the road, described in the petition, was a county road; and upon their default and neglect to interpose this objection, the commissioners might well presume that the road was correctly described as a county road,

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and that, as such, they might proceed to adjudicate upon the expediency of the repairs, and order the same to be made.

We do not perceive why this view of the subject will not be found to be sound in principle, and such as will sufficiently secure the rights of towns, or other parties in interest, requiring of them only the usual vigilance that is requisite in arresting other proceedings which may be avoided by a proper defence made at a suitable stage of the proceedings, but which, if sanctioned by their silence and default, may ripen into judgments affecting their rights.

The original jurisdiction of the commissioners upon the petition, in the form in which it was presented, describing the road as a county road, was well warranted, subject to its being defeated, if, upon the hearing before them, it appeared that the allegation that this was a county road was not sustained. The case of the petitioners for a writ of prohibition is therefore to be decided upon the general principles, applicable to other cases where the party, having a legal defence, neglects to avail himself of it at the proper period, and afterwards seeks the aid of this court in the form of a petition, addressed to its sound discretion, to grant him the opportunity to reverse the proceedings.

In this view of the question submitted to us, the case of the petitioners does not present itself under favorable circumstances for granting the relief prayed for. The effect of these proceedings by the county commissioners, which the petitioners would now quash as erroneous, has been to cause an expenditure of a large sum of money in the amendment of a road in the town of Whately, and, as the petitioners now before us allege, upon a town way laid out particularly for the use of the inhabitants of that town. Such expenditure could have been ordered by the commissioners only upon the assumption that this was a county road or public highway. But the effect of quashing the proceedings would be to leave the inhabitants of Whately in the full enjoyment of all the benefit of the amendments and repairs of the road, and yet discharge them from the burden of paying for these expenditures. It is obvious, therefore, that the parties will not, if the proceedings are quashed, be placed *in statu quo*

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It is peculiarly one of those cases where the mischievous consequences of setting aside the proceedings of an inferior tribunal should have their proper influence and effect upon the decision of a question in which the court are to exercise a judicial discretion.

Upon the whole matter, the court are of opinion that the application for a writ of prohibition must be denied.

SPENCER ROOT & others *vs.* RICHARD COLTON.

In the levy of A.'s execution, appraisers set off twenty-two acres of the judgment debtor's land, subject to a supposed life estate of S. in one half thereof, S. having no estate therein, and deducted from the appraised value of the land the amount of such supposed incumbrance: B. afterwards caused an execution against the same judgment debtor to be levied on the land, appraised at its value as an unincumbered fee simple. In an action by B. against A. to recover possession of said land, it was held that he was entitled to recover, as A.'s levy was vitiated by the proceedings of the appraisers. *Held* also, that A. could not support his levy against the levy of B. by showing that at the time when both executions were levied, the judgment debtor in fact owned only eight acres of the land as an unincumbered fee, and had only an estate during the life of L. in the remaining fourteen acres.

WRIT of entry to recover a parcel of land in Northfield, called the Lyman pasture. The demandants claimed title under the levy of an execution in their own favor against Edwin Moody, on the 16th of April, 1839. The tenant claimed title under a prior levy of an execution against said Moody in favor of Eunice Brooks, and a conveyance from her to the tenant.

It appeared at the trial, that in appraising said Moody's estate in the demanded premises, on the levy of the last mentioned execution, the appraisers deducted therefrom the value of a supposed life estate of a Mrs. Smith, in an undivided moiety thereof; but that no such incumbrance then existed, as Mrs. Smith, after her marriage, and before the levy or attachment of said Eunice Brooks, had, jointly with her husband, executed and delivered to said Moody a quitclaim deed of all her interest in said premises.

The following is a copy of the appraisement which appeared

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in the return on said execution: "We have set off the Lyman pasture and the swamp lot, as before described, subject to Sarah Smith, (widow of the late Samuel Lyman) right to the use of one half of the same during her life, appraised at $243·75." On said execution of the demandants, the same premises were appraised as a fee simple estate, by the same appraisers, at $322·19.

It was proved, or admitted, that said Lyman pasture contained twenty-two acres and sixty rods.

The tenant was permitted (the demandants objecting thereto) to give evidence, which had come to his knowledge since the levy of said execution, that Arad Lyman had another and different interest in a part of said premises, and that said Moody had a title in fee simple in only eight acres and sixty-two rods of said premises, and only a right to the use of an undivided moiety of the residue thereof during the life of said Sarah Smith. The tenant was also permitted to show, by the parol testimony of said appraisers, that the real value of said Moody's interest in the demanded premises, as above ascertained, is only $170·37. The case was taken from the jury for the consideration of the full court.

Such judgment to be rendered as the court shall direct.

H. G. Newcomb and *Aiken*, (*Grennell* was with them) for the demandants. The levy on which the tenant relies would have been void, if Moody had owned the unincumbered fee, as it was made with a deduction of a non-existing incumbrance. Rev. Sts. c. 73, § 8. See *Barnard* v. *Fisher*, 7 Mass. 71. *Atkins* v. *Bean*, 14 Mass. 404. *Litchfield* v. *Cudworth*, 15 Pick. 27. And this objection applies to the eight acres in which only he had such a fee, as well as to the whole lot.

In statute conveyances, all the requisitions of the statute must be complied with, and such compliance must appear on the proceedings. 15 Pick. 28, and cases there cited. *Pickett* v. *Breckenridge*, 22 Pick. 297. Parol testimony of appraisers cannot be received for the purpose of substituting a new appraisement, nor to show any thing which does not appear in the return. *Waterhouse* v. *Gibson*, 4 Greenl. 230.

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Wells and *Davis*, for the tenant, argued that he might show that his debtor had a less estate in the demanded premises, than that described by the appraisers. Commissioners' note to Rev. Sts. c. 73, § 8. *Litchfield* v. *Cudworth*, 15 Pick. 23. *Mechanics' Bank* v. *Williams*, 17 Pick. 438. *Hitchcock* v. *Hotchkiss*, 1 Connect. 470. *Coos Bank* v. *Brooks*, 2 N Hamp. 151. *Whiting* v. *Bradley*, 2 N. Hamp. 83.

The tenant *has* shown a less estate in his debtor, than that which was set off on execution. The return shows that more than eight acres was allowed to the debtor. The evidence shows that the tenant took a fee in eight acres, and a reversion in the remainder, being a larger estate than the debtor had. According to the authorities, therefore, the tenant is entitled to hold what the debtor had.

If this view of the case is not adopted by the court, yet the tenant may show that the mistake in the appraisement was to his own detriment, and not to that of the demandants or others. A levy will not be set aside, unless the judgment debtor is injured.

Dewey, J. The objection taken to the validity of the levy of the execution in favor of Eunice Brooks, under whom the tenant derives title, is, as it seems to us, an insuperable one. The judgment creditor must at his peril, in making his levy upon the real estate of the debtor, cause to be appraised as great an interest as the debtor has in the premises levied on. He may indeed treat an incumbered estate as though the same were held by the debtor by an indefeasible title, making no deduction for such incumbrance; and in such case he will acquire a legal title to the extent of the debtor's interest, whatever that may be. *Mechanics' Bank* v. *Williams*, 17 Pick. 438. Such a levy could not operate prejudicially to the interest of the debtor. To obviate all uncertainty as to the extent of the interest thus seized and appraised, the Rev. Sts. c. 73, § 8 require that "in estimating the value of the estate of the debtor, the appraisers shall always value it as an estate in fee simple in possession, unless it is expressly stated in the description, indorsed on the execution, to be a less estate." The present return does, in this respect, fully comply with the requirements of the statute

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The difficulty here is not the want of formality in the return, but it arises from the fact that the real interest of the debtor in the land was not correctly described in the levy, and that the property was not in fact subject to any such incumbrance as was supposed to exist, and on account of which a deduction to a considerable amount was made from the value of the premises levied upon. The estate of the debtor was appraised subject to the incumbrance of a life estate in one Sarah Smith in one half of the same. But there was no such incumbrance existing, the judgment debtor having previously acquired the interest of Sarah Smith in the premises, by a conveyance from her. Such being the state of the property, and of the defendant's interest in the same, it was not competent for a judgment creditor to have the same set off and appraised subject to the incumbrance of a life estate in Sarah Smith; as the effect would be to transfer to the creditor a greater interest than was estimated by the appraisers, leaving the debtor to sustain an injury to the entire amount deducted by the appraisers for the supposed incumbrance. The levy must for this cause be held invalid, or manifest injustice would be done to the debtor who should thus be deprived of the benefit of an appraisement of his true interest in the premises levied upon.

But it is contended by the tenant, that the levy ought not in the present case to be avoided by reason of the erroneous deductions for a supposed incumbrance, inasmuch as there was, in relation to a part of the land set off on his execution, a want of title in the debtor, even to the extent it was estimated in the appraisement and description in the return; so that the whole estate actually acquired by the creditor under the levy was less valuable than that appraised, and so no injustice has been done to the judgment debtor. We do not think this view of the case, though apparently an equitable one, can be sustained by us when required to settle the legal rights of the parties. The return of the levy and appraisement shows that from the whole estate in the land seized there was a deduction for a supposed incumbrance. The facts proved in the case show that as to eight acres of the land appraised, the debtor had a title in fee

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simple, and that no part of the estate levied upon was under any such incumbrance as is described in the return and on account of which a deduction was made from the value of the debtor's interest in the premises set off. This deduction, having been made for an incumbrance not in fact existing, was illegally made, and must necessarily vitiate the levy and subject the premises to be seized by any other creditor of the judgment debtor. The demandants, having duly levied their execution on the same, are therefore entitled to recover the premises demanded in the present action.

Tenant defaulted.

Charles C. Dewey *vs.* Roland Dewey

It is not necessary that the attesting witnesses to a will should subscribe it in the presence of each other.

It is sufficient *primâ facie* evidence that the attesting witnesses to a will subscribed it in the presence of the testator, if he were so situated that he might have seen them subscribe it.

Where one of the attesting witnesses to a will has no recollection of having subscribed it, but testifies that the signature of his name thereto is genuine; the testimony of another attesting witness, that the first did subscribe his name in the testator's presence, is sufficient evidence of that fact.

A will subscribed by three witnesses at the testator's request and in his presence, he declaring it to be his will, is well attested within the Rev. Sts. *c.* 62, § 6, although neither of the witnesses saw him sign it or heard him acknowledge his signature thereto, and only one of them saw the testator's name thereon.

This was an appeal from a decree of the judge of probate for the county of Hampden, allowing a certain instrument as the last will of Timothy Dewey. The only question raised in the case was, whether said instrument was "attested and subscribed, in the presence of the testator, by three or more competent witnesses," conformably to the Rev. Sts. *c.* 62, § 6. Said instrument purported to have been executed on the 26th of April, 1838, and was signed by Medad Fowler, Josiah Fowler, and Silas Root, as attesting witnesses. The clause of attestation, which preceded the signatures of these witnesses, was thus: "Signed, sealed, published and declared, by the above or fore-

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named Timothy Dewey, to be his last will and testament, in the presence of us, who at his request and in his presence have hereunto subscribed our names as witnesses to the same."

At the trial, before *Wilde*, J. after the testimony of the subscribing witnesses, as hereinafter stated, had been given, the parties agreed that the case should be taken from the jury and be determined by the court, upon that testimony.

Medad Fowler testified that his name, which was upon said instrument, appeared to be his handwriting, but that he had "no recollection any thing about it."

Silas Root testified that said Timothy called on him and said he had a will, and wished him to put his name on it as a witness; that this was said out of doors, and thereupon he and said Timothy went into said Root's house, where the said Timothy handed him the paper folded, and he signed his name as a witness thereto, said Timothy being in the same room with him. He could not say that said Timothy saw him sign as a witness. Said Timothy's name was then on the paper, but he said nothing about its being his signature. Said Root believed that said Timothy had the paper in his hand when he first mentioned that he had a will, but the witness did not look at it until he went into the house. The witness said that it occurred to him, after said Timothy went away, that he (the witness) ought to have inquired of him whether it was his signature.

Josiah Fowler deposed that said Timothy brought a paper to the house of the deponent's father (Medad Fowler) which he called his will, and requested the deponent and his father to sign it as witnesses, and not to read it. Deponent thought he did not see said Timothy sign it; but the deponent and his father signed it as witnesses, without reading it. Deponent did not recollect seeing a word of writing on the paper, which he "thought, at the time, was not right or as it should be."

W. G. Bates and *Blair*, for the appellee. It is not necessary that the witnesses should attest in the presence of each other, or that the testator should declare the instrument to be his will *Cook* v. *Parsons*, Pre. Ch. 184. *Bond* v. *Seawell*, 3 Bur. 1775. 1 Doug. 244, *note*. Nor is it necessary that

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the witnesses should see the testator sign the instrument, or even see his signature thereto. 3 Harrison's Digest, 2186, cites 6 Bing. 310. 7 Bing. 457. The testator, having carried the paper to the witnesses and acknowledged that it was his will, acknowledged all that was necessary to make it his will, viz his signature, &c. *Ellis* v. *Smith* 1 Ves. Jr. 11. *Jackson* v. *Vickory*, 1 Wend. 412. *Hall* v. *Hall*, 17 Pick. 373. It is sufficient if the testator was so situated that he *could* see the witnesses subscribe their names to the instrument. 3 Harrison's Digest, 2185, cites 1 M. & S. 294. 2 Car. & P. 488.

Wells and *Leonard*, for the appellant. This instrument cannot be brought within the Rev. Sts. *c.* 62, § 6, unless the court make such "large and liberal constructions" to take the case out of the statute, as Lord *Hardwicke* said "courts ought to avoid making." Roberts on Frauds, 324, cites Amb. 300. See also 1 Bl. Com. 88. The court will not go beyond the cases already adjudged, in derogation of the words of the statute.

The attestation of the witnesses should be to the signature of the testator as well as to his publication. It has, indeed, been held sufficient, if the testator admit or recognize his signature in their presence. *Stonehouse* v. *Evelyn*, 3 P. W. 254. Toller on Executors, 2. 4 Kent Com. (3d ed.) 515. In the present case, nothing has been attested by the witnesses, except publication. It is doubtful whether the testator's signature was on the paper before the two first attesting witnesses subscribed it, as Josiah Fowler saw no writing. The testator did not admit or recognize his signature, unless he did it by saying that the paper was his will; and that this is not sufficient was decided in Virginia, in *Burwell* v. *Corbin*, 1 Rand. 131. See also *Gryle* v. *Gryle*, 2 Atk. 177, & *note*. Pow. Dev. 80. 5 Mass. 227.

Dewey, J. The only question raised in this case is, whether this will was duly attested.

The provisions of the English statute of 29 Car. II. *c.* 3, § 5, requiring that "all devises of lands shall be attested and subscribed in the presence of the devisor by three or four credible witnesses, or else shall be utterly void and of no effect," were

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adopted as a part of our code, by the provincial act of 1692, and in similar language. The statute of 1783, *c.* 24, § 2, again reënacted the same provisions, with no other change but that of using the phrase "three or more witnesses" for "three or four witnesses"; and this statute remained in force till the passing of the Rev. Sts. *c.* 62, § 6, which, although somewhat changing the phraseology, and rendering the language more concise, does not, in any degree, vary the requirements as to the attestation of the witnesses; the principal changes introduced being those requiring the same solemnities in the disposition of personal and real property, and in restricting within much narrower limits the right to make nuncupative wills.

Under this long continued and substantially uniform legislation on the subject of the execution of wills, the construction of those statutes, as to the acts necessary to constitute the due execution of a will, have, to a considerable extent, become well settled. It is not required that the testator should sign his name to the will in the presence of the attesting witnesses. The term "attested," as used in the statute, does not import that it is requisite that the witnesses should see the very act of signing by the testator. The acknowledgment by the testator, that the name signed to the instrument is his, accompanied with a request that the person should attest as a witness, is clearly sufficient. *Stonehouse* v. *Evelyn*, 3 P. W. 254. *Grayson* v. *Atkinson*, 2 Ves. sen. 456. So a declaration by a testator, before the witnesses, that the paper is his will, is sufficient to authorize their attestation to it, and to make it a good will. *Ellis* v. *Smith*, 1 Ves Jr. 11. *Westbeech* v. *Kennedy*, 1 Ves. & Beames, 362. Nor is it necessary to the due execution of a will, that the attesting witnesses should be all present at the same time, but a will attested by three witnesses, who at different times subscribe their names as witnesses, at the request of the testator, is well attested. *Cook* v. *Parsons*, Pre. Ch. 184. Cruise's Digest, Tit. 38, *c.* 5, §§ 35, 36. 3 Bur. 1775, per Lord *Mansfield*. So the provision, that the instrument shall be attested by three witnesses "in the presence" of the testator, has been liberally construed; it being held sufficient evidence of

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the presence of the testator, if the facts show a possibility of his seeing the witnesses subscribe their names, unless controlled by other evidence showing that in fact he did not see them, and that therefore it was not done in his presence. *Longford* v. *Eyre*, 1 P. W. 740. *Casson* v. *Dade*, 1 Bro. C. C. 99. *Winchilsea* v. *Wauchope*, 3 Russell, 443.

A construction alike liberal has been given as to the attesting witnesses' knowledge of the signature of the testator. Thus in *White* v. *Trustees of the British Museum*, 6 Bing. 310, and in *Wright* v. *Wright*, 7 Bing. 457, it was held that a will subscribed by three witnesses, in the presence and at the request of the testator, was sufficiently attested within the statute, although none of the witnesses saw the testator's signature, and only one of them knew what the paper was. A similar decision was made in *Johnson* v. *Johnson*, 1 Crompt. & Mees. 140. It was said by the court, in the first of these cases, that any declaration before the witnesses, by the testator, that it is his will, is equivalent to an actual signature in their presence, and makes the attestation and subscription of the witnesses complete. *Tindal*, C. J. said that "in the execution of wills, as well as of deeds, the maxim will hold good, *non quod dictum, sed quod factum est, inspicitur.*"

The only inquiry, therefore, as it seems to us, is, whether upon the evidence, in the present case, it may be reasonably inferred that the testator signed his name to the instrument, as and for his will, and that he acknowledged that fact to the witnesses, either directly, or by acts equivalent to an acknowledgment. *Hall* v. *Hall*, 17 Pick. 373.

The testimony of Medad Fowler is wholly deficient as proving the due execution, except so far as the inference is to be drawn from the fact of his name, under his own proper signature, being borne upon the instrument under the usual certificate of attestation. But the question is not whether this witness now recollects the circumstance of the attestation, and can state it as a matter within his memory. If this were requisite, the validity of a will would depend not upon the fact whether it was duly executed, but whether the testator had been fortunate in

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securing witnesses of retentive memories. The real question is, whether the witness did in fact properly attest it. The deposition of Josiah Fowler, who signed his name as a witness at the same time, supplies, however, some omissions in the testimony of Medad Fowler, and establishes the fact that at that time the testator called the paper his will, and requested them to sign it as witnesses. This witness, however, does not recollect seeing any writing upon the paper he signed. But the remaining witness, Silas Root, whose name appears upon the will, and apparently subscribed after the others, fully establishes similar declarations from the testator as those stated by Josiah Fowler, as to the fact that the testator declared to him that he had a will, and wished him to put his name to it as a witness; and he states that he looked at it in the house, and that the testator's name was then on it, but that he did not inquire whether it was the testator's signature — leaving the inference properly to be drawn that he saw the name of the testator duly subscribed to the will. Certainly the presumption, arising from all the facts that appear in the case, is very strong that the will was subscribed by the testator before it was attested by the witnesses. The signature of the testator is admitted to be a genuine signature, and the certificate of attestation assumes that it had been already signed. The purpose of procuring the attestation of the witnesses was to give effect to the instrument as a valid will. It can hardly be supposed that the testator, who was by his own active agency procuring the authentication of the instrument by the requisite witnesses, would have omitted the first step necessary to its due execution, viz. the signature by himself.

It seems to us, upon the whole evidence, that the will was duly signed by the testator, and being thus signed, he by his acts, if not by his declarations, sufficiently recognized and acknowledged his own execution of it to authorize the three witnesses to attest and subscribe the same as witnesses thereto, in accordance with the provisions of the statute.

The decree of the judge of probate, allowing the probate of the will, is therefore affirmed.

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Roland Sackett *vs.* John A. Mallory, Jun.

A testator, after giving pecuniary legacies to eight of his children in full of their respective portions of his estate, devised to his other children, C. and R., all his real estate in fee, upon condition that neither of them should make any claim upon his estate, and that if either of them should make such claim, he should have no right under the will: C. made a claim upon the testator's estate, which was paid by the executor. *Held* that C. and R. took the real estate as tenants in common, upon a condition subsequent, by breach of which C. forfeited his moiety thereof under the will, and that the same descended to the testator's heirs at law.

Trespass *quare clausum fregit.* The plaintiff claimed title to the *locus in quo* under the will of his father, Ezra Sackett, which was duly proved and allowed in June 1834, and which contained this clause: "All the real estate which I own I hereby give, devise and bequeath unto my two sons, Charles Sackett, and Roland Sackett" (the plaintiff,) "to be holden by them, their heirs and assigns forever, after all my debts and legacies shall have been paid; but upon this condition, that no claim shall be made by the said Charles or the said Roland, or their heirs, executors or administrators, or either of them, against my estate, after my decease; and if either of them shall make any claim, the one making the claim shall have no right by virtue of this will." The testator also, by said will, authorized his executors to sell so much of his real estate as should be necessary to pay his debts and legacies, if his personal property should not be sufficient for that purpose. To his eight other children the testator bequeathed small pecuniary legacies, declaring the same to be in full of their respective portions of his estate.

It was agreed by the parties, that said Charles Sackett made a claim against the estate of the testator, and that it was paid by the executors from the proceeds of the testator's real estate sold by them under the authority therefor contained in said will. It was also agreed that if, by making such claim, said Charles forfeited his whole interest in the testator's real estate, and the same vested in the plaintiff, the defendant should be defaulted; but that the plaintiff should become nonsuit, if the interest in said real estate, which was devised to said Charles, descended

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to the testator's heirs at law, or did not vest wholly in the plaintiff.

Blair, for the plaintiff, cited *North* v. *Crompton*, 1 Chan. Cas. 196. *S. C.* 1 Eq. Cas. Ab. 272. Bac. Ab. Wills, F. *Anderson* v. *Parsons*, 4 Greenl. 486.

Leonard, for the defendant.

DEWEY, J. The effect of that clause in the will of Ezra Sackett, under which the question now before us is raised, was to vest in Charles Sackett and Roland Sackett, as tenants in common, all the real estate of the testator which should remain after the payment of his debts and legacies, to be held by them upon a condition subsequent, by a breach of which the estate devised to either might be forfeited.

That the estate vesting in these devisees was held by them as tenants in common and not as joint tenants, cannot admit of a doubt. By the provisions of *St.* 1785 *c.* 62, §4, all devises of any lands which shall be made to two or more persons, shall be taken to be estates in common and not in joint tenancy, unless it shall be therein said that the devisees shall have or hold the same lands in joint tenancy, or to them and the survivors of them, or unless other words be therein used, clearly and manifestly showing it to be the intention of the devisor that such lands should vest and be held as joint estates, and not as estates in common. It is not declared in this devise, that the devisees shall hold the lands devised to them as joint tenants, nor are there other words in the will clearly and manifestly showing it to be the intent of the testator that they should be thus holden.

This question may be well considered under another state of facts, in which the case might have presented itself for adjudication. Suppose there had been no breach of the condition, and no forfeiture of the estate of either, but, subsequently to the vesting of the estate under this devise, one of the devisees had deceased; what would have been the rights of the survivor? Could he, as against the heirs at law of the deceased devisee, claim the whole estate by survivorship? Was such a result in the contemplation of the testator, or is it in conformity with the provisions of our statute regulating joint tenancy? In the case

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supposed, I apprehend no doubt could be entertained, but that the estate would descend to the heirs at law of the deceased devisee. But if this estate is to be taken to be a joint tenancy o any purpose, it must be to all, and the consequence of survivorship must attach to it in case of the death of one of these devisees, after they became seized of the estate. This devise is in its legal effect precisely the same as if the testator had devised an undivided moiety of his real estate, remaining after the payment of his debts and legacies, to Charles, under the same conditions which are attached to this devise, and had, in a distinct clause, devised the other undivided moiety of his real estate to Roland, also under conditions like those annexed to this devise.

By the terms of the devise to Charles Sackett and Roland Sackett, there was a contingent remaining interest, in the land, which might by possibility revert to the estate of the testator. Charles Sackett, by reason of his breach of the condition, has forfeited his estate under the will, and his interest in the land reverting to the estate of the testator must pass to the heirs at law as intestate property, unless some provision is found in the will devising the same to some one or more devisees. The plaintiff insists that the obvious intent of the devisor must have been, that upon the failing of either of these devisees to hold the estate devised to them respectively, by reason of a breach of the condition annexed to this devise, it should be taken to be a sole devise, or that the devisee who had complied with the conditions should, under the will, be held to succeed to the estate reverted by the forfeiture; and it is said that this construction only can do justice to the plaintiff, inasmuch as the effect of a non-compliance, by one of the devisees, with the condition attached to the devise, is directly to increase the amount of debts chargeable upon the real estate, and thus lessen materially the value of the residuary devise to the other. Such, it is obvious, may be the effect, and thus will be produced a very different result in the distribution of this estate, from that which would have occurred, if both the devisees had taken and held their moieties under the will. This presents a strong equitable view of the

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case in favor of the plaintiff, and it is very possible that such a result might be more in accordance with what would have been the declared wish of the testator, if he had foreseen the happening of the event of the forfeiture of the share of Charles Sackett, and had proceeded to dispose of the estate that would thus revert. But the difficulty in the plaintiff's case is, that the testator omitted to make any disposition, by his will, of the estate which might revert by reason of the breach of the condition annexed to the devise to Charles Sackett. In the devise, the testator plainly provides that the making of any claim against his estate by Charles Sackett shall forfeit his right under the will; but he omits to add, either expressly or by reasonable implication, that in such an event the whole residuum of his real estate is devised to Roland Sackett. Not being disposed of by any provision in the will, the estate which has thus reverted is intestate estate, and as such is to be distributed among the heirs at law.

It was urged in the argument for the plaintiff that the estate in controversy could not properly be the subject of distribution among the heirs at law generally, as undevised estate, without doing violence to the provisions of the will; as the testator, in relation to his other heirs at law, in the small specific legacies given to them, has recited that the same was to be in full of their portion of his estate. This provision in the will is doubtless entitled to much consideration in giving a construction to the other clauses therein, when their meaning is ambiguous and open to such construction; but it does not in itself operate to estop the legatees from claiming their share of any undevised estate that may descend to them as heirs at law of the testator.

Some reliance was placed upon the case of *Anderson* v. *Parsons*, 4 Greenl. 486, a case in which certainly a very liberal view was taken in favor of a joint tenancy and right of survivorship, as arising under a devise. Without expressing any opinion upon the question there presented, it is sufficient for the present purpose to say that we do not feel warranted in coming to the same result upon the facts stated in the case now before

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us; and that, for the reasons already stated, the plaintiff cannot maintain his title, as sole owner, to the land conditionally devised to himself and Charles Sackett.

Plaintiff nonsuit

Charitable Association in the Middle Parish in Granville *vs.* Lyman Baldwin.

Where a suit is commenced and prosecuted by a corporation, by direction of its officers *de facto*—no other persons claiming a right to act as its officers—the defendant cannot be permitted to show, for the purpose of procuring the suit to be dismissed, that those officers were illegally elected.

Where a suit is brought in the name of the party to whom a promise was actually made, a mistake in the name of the promisee, as described in the promise, furnishes no ground of defence to the promisor.

Assumpsit on two promissory notes, one for $200, and the other for $100, given to the plaintiffs by the defendant. One of said notes was made payable to "the Charitable Association," without further designation of the payees.

The case was submitted to the court on a statement made by the parties, to the following effect: Timothy Robinson and others, and their associates, were made a body corporate by *St.* 1797, *c.* 29, (2 Special Laws, 185,) under the name of "The Charitable Association in the Middle Parish in the town of Granville." In the preamble of this statute, it is set forth that livers persons in Granville had associated for the purpose of supporting the preaching of the gospel in said parish, and were desirous of being enabled to raise and manage a common fund for that purpose. Before the passing of this statute, viz. on the 1st of June, 1796, the associates thereby incorporated had subscribed certain articles of association, two of which were in substance as follows: 1st. That the associates would annually choose a committee of three or more, whose duty it should be to aid and advise Elihu Adkins, trustee of said associates, or his successor in that office: 2d. That said trustee or his successor, with the advice of the advising committee, should have

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power, and that it should be their duty, at any time when they should find any associate about to remove from the town of Granville, or for any other just cause, to commence a suit against any associate, and collect his note, &c.; but that such associate, when thus sued, might cause the suit to be stopped, by paying cost and satisfying the trustee, or a majority of the advising committee, "that the money is safe"; or, if he should think the trustee or committee unreasonable in demanding security, he might appeal to the proprietors of the fund, whose decision should be final.

It appears from a book purporting to be the records of said corporation (the plaintiffs) that at its first meeting, March 10th, 1800, it was "voted, that the advising committee post up notifications, fourteen days, at two or more public places, before the time set for calling future meetings." It does not appear that the clerk, chosen at this meeting, was sworn.

The following votes, &c. also appear in said book: March 12th, 1810. "Voted that the advising committee shall issue a warrant to the clerk, for the purpose of warning future meetings relative to the fund." To the entry of the choice of clerk at this meeting, and also at the meeting, April 1st, 1839, is added the word *sworn*. March 12th, 1822. "Voted to accept the report of the committee on the subject of voters, viz. that the original donors are voters; that all purchasers of the entire estate of a donor, with the understanding of the donor and purchaser, that the purchaser succeed to all rights in the fund, be a voter; that an heir, in order to become a voter, must be the sole heir, or he must have the consent in writing of all the other heirs that he shall be the sole voter; and the voter shall always be an inhabitant of the middle parish; that no person, by purchase or heirship, shall be a voter, unless he be, at the time, an inhabitant of the middle parish." The article in the warrant calling the meeting at which the foregoing report was made, was in these words — "to act on the report of the committee chosen to ascertain who were to be considered legal voters at the meetings of said association." March 23d, 1835 "Voted that all persons who now are, and shall hereafter

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be legal voters in town affairs in the town of Granville, and that reside in the middle parish in said town, and belong to or are members of the congregational society in said parish, and shall have subscribed their names to the constitution of the Charitable Association in said parish, shall be members of said association, so long as they reside in said parish and continue members of said congregational society." The articles in the warrant calling the meeting at which this vote passed, were "to choose the officers of said association," and "to do all other business proper then and there to be done."

After this vote, twenty individuals signed said articles, attended the meetings and took part in the proceedings and votes of said association, no other vote having passed recognizing them as members. Among these individuals is the person who has assumed to be clerk of the association since September 14th, 1837, also the moderator of two of the meetings at which the clerk is alleged to have been chosen, and also the agent under whose direction this suit is prosecuted. Said agent has a certificate, from said clerk, of a vote appointing him agent with authority to prosecute this suit; some of these individuals, claiming to be members under said vote of March 23d, 1835, voted upon the question of appointing said agent, and also in the choice of the successive advising committees.

The trustee of the association, who was chosen in 1839, was not an original signer of the articles of association, and it does not appear how or when he signed them; but he was chosen one of the advising committee, in 1821. A majority of the advising committee for 1839, in which year this suit was commenced, and the trustee for the preceding year, by whom the meeting was warned, and also the committee, by whom it was called, became members of the association, if at all, by the vote of March 23d, 1835. The defendant has been a member of the association, and still continues such, if it now has a legal existence.

The $200 note now in suit was given by the defendant, as a substitute for notes formerly given by his father and brother, on a joint subscription by him and them to the funds of the asso-

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ciation; and the $100 note was given for money borrowed of the association.

The advising committee gave their advice or consent that the present suit should be commenced, by putting down the names of the persons whose notes were to be secured, and directing the trustee to attend to them; but such direction was not given in writing; and the plaintiffs' attorney appears in this case by direction of the committee whose names are on the record of the association.

It was agreed by the parties that the plaintiffs should become nonsuit, if said committee could not legally authorize said attorney to appear; or if neither he nor the plaintiffs be legally entitled to prosecute this action; or if, from any cause appearing from the facts above stated, and from the records and articles of association, notes declared upon, and act of incorporation, (all of which are part of the case) this action cannot be maintained upon legal principles; but that the defendant should be defaulted, if the plaintiffs are legally entitled to recover.

Boise and *Leonard*, for the defendant. The 4th section of the act incorporating the plaintiffs (*St.* 1797, *c.* 29) directs that their votes and proceedings shall be kept and recorded by a clerk sworn to the faithful discharge of his duty. Their records do not show, and there is no other evidence, that the clerk was sworn, for several years, nor by whom, when sworn at all. His entries, therefore, furnish no evidence of the due organization of the corporation, or of the legality of its proceedings, or even of its meetings.

The original articles of association are, by virtue of the plaintiffs' act of incorporation, binding rules for their government. But the advice of the advising committee was not given according to those articles, before this suit was commenced.

There is no provision in the plaintiffs' act of incorporation for the admission of new members; and they cannot rightfully be admitted by mere vote, from time to time. The plaintiffs should have established a by-law on the subject, constituting a fundamental rule of the association. The plaintiffs had no authority to pass the vote of March, 1835, admitting all the mem-

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bers of the parish who should subscribe the original articles, and thereby giving the whole power of the association to a different body, viz. the congregational parish. Besides the want of authority to pass such a vote under any circumstances, there was no article in the warrant for the meeting at which it was passed, that authorized any vote respecting new members.

If the advising committee had conformed to the original articles, in directing this suit, yet the proceedings of the plaintiffs have been such as show that the committee was not legally chosen, and had no power to act at all. It is not admitted by the defendant that the association has any longer a corporate existence.

The note for $100 being made payable to the Charitable Association, without describing the payees further, the plaintiffs cannot maintain an action upon it.

W. G. Bates, for the plaintiffs. There is no evidence that the original articles of association, now produced, are those which are supposed to be referred to in the preamble to the plaintiffs' act of incorporation. Nor does that preamble, either expressly or by necessary implication, refer to any *articles* of association. It merely sets forth that certain persons had associated, &c. Nor is there any evidence that the corporation ever adopted those articles.

The original articles directed that suits should be commenced by Elihu Adkins or his successor, under the advice of a committee. This cannot be a binding rule under the act of incorporation. But if that rule were binding, and if the trustee chosen by the corporation be the *successor* of the trustee of the unincorporated associates, yet it would not avail the defendant in this case. He should have appealed to the proprietors of the fund, according to the original articles.

The court will not, in this suit, inquire into the regularity of the election of the officers of the corporation.

Dewey, J. The principal question raised in this case is as to the authority of those, who are conducting the present action, to institute the suit and prosecute the same to final judgment in the name of the plaintiffs. The defendant contends that by

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virtue of the articles of association of the original members of the Charitable Association in Middle Granville, which preceded the act incorporating the plaintiffs, and, as is said, by force and effect of their charter became incorporated with the same for the future government of the association, no suit could be instituted upon promissory notes given to the association, except with the advice and consent of the major part of the advising committee of said association — a committee to be chosen by the association annually. It is then further contended that the present organization of the association is illegal and in violation of the articles of association, and the provisions of the act of incorporation, inasmuch as persons not competent to become members have been admitted, and acted as such at the annual meetings; and that the present advising committee were chosen by the votes of persons not legal members; and that the majority of the individuals composing said advising committee were not eligible as such, not being legal members. The defendant insists that for these causes the persons composing said committee are not empowered to act in the matter of instituting actions on the promissory notes given to the association, and that the present suit, having been instituted without the advice and consent of any legal advising committee, was instituted without authority, and in violation of the rights of the defendant, and ought therefore to be dismissed.

In the view we have taken of this case, we have not thought it necessary to determine what effect should be given to the by-law, or article of association under consideration, if a suit had been instituted upon one of the notes of the association without the advice and consent of those acting as the advising committee. Whether this by-law merely enjoins a duty upon the officers of the corporation rather than secures a privilege to the debtors, and if a privilege, whether it was not to be construed as a collateral agreement, which under the decisions of this court in *Dow* v. *Tuttle*, 4 Mass. 414, and *Allen* v. *Kimball*, 23 Pick., would not bar the present action, but leave the party to recover his damages in a cross action, would, in such a state of the facts, require our particular consideration. But it seems to the court

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that those questions cannot be properly raised in the present case. The case finds that at the regular annual meeting of this association, an agent and an advising committee were declared to be regularly chosen, and that the persons thus chosen are the individuals who have advised and consented to this suit. These persons are, *de facto*, the agents and advising committee; and the case does not show that any other individuals claim to hold these offices, or to have been legally elected to them, or to assert any rights as such. The persons composing the advising committee being then officers *de facto*, and no other persons claiming the right to act in that capacity, it is not competent for the defendant to resist the payment of his notes, upon the ground that the committee were not duly elected, and are not legally authorized to act as such. The defendant cannot, we think, thus raise the question of the legality of the election of the present officers of the corporation, or of the authority of the corporation to alter their by-laws regulating the admission of members and prescribing their qualifications.

An independent objection was taken to one of the notes sought to be recovered in this action, that, upon the face of it, it was not made payable to the plaintiffs by their appropriate name. It is not denied that the plaintiffs were the parties to whom the promise was intended to be made, but merely that there is a misnomer of the payee. This objection cannot avail the defendant. Where the parties to a contract can be ascertained, and the suit is instituted in the name of the real party, a mistake in the name of the promisee, as described in the promise, will not furnish any ground of defence. *Medway Cotton Manufactory* v. *Adams*, 10 Mass. 360. *Commercial Bank* v. *French*, 21 Pick. 490. *City of Lowell* v. *Morse*, (*post.* 473.)

Upon the whole matter, the court perceive no sufficient reason why the plaintiffs should not maintain their action.

Defendant defaulted.

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Lewis Gorham & another *vs.* Charles Stearns.

A payment or assignment by a debtor, to one of his creditors, is not void as to his other creditors, under *St.* 1838, *c.* 163, § 10, unless it be made by the debtor in contemplation of becoming insolvent and obtaining a discharge under the provisions of that statute.

The stock in trade of a debtor, who was insolvent, was attached by several of his creditors, and he afterwards, on the same day, but not then intending to take advantage of *St.* 1838, *c.* 163, nor even knowing there was such a statute, assigned to another creditor choses in action to secure what he owed him, and also to indemnify him against liabilities incurred on said debtor's behalf: On the next day, the debtor made application to a master in chancery for the benefit of said statute, and assignees of his property were afterwards duly appointed. *Held*, that the assignment to said creditor was not void as to the other creditors, within the terms of the tenth section of said statute.

In deciding a case stated by the parties, where the statement sets forth the testimony of witnesses, the court must take such testimony to be true.

This was an action by the assignees of Lester Belden, an insolvent debtor, to recover the avails of book debts and promissory notes transferred by him to the defendant to secure payment to the defendant of a debt due to him from said Belden, and also to secure the defendant against a liability which he had incurred by indorsing one of said Belden's notes.

The case was taken from a jury, and submitted to the court upon this statement of facts: "On the 11th of December, 1838, said Lester Belden made application to a master in chancery for the benefit of the act for the relief of insolvent debtors;" (*St.* 1838, *c.* 163,) "and after due proceedings upon this application, the plaintiffs were appointed assignees, at a meeting of his creditors held January 4th, 1839.

"Said Belden, until the spring of 1838, was in partnership with his brother, William Belden. William testified that when they dissolved their partnership, Lester expressed doubts whether he should be able to pay his debts unless he should dispose of his stock to good advantage. On the 10th of December, 1838, his stock in trade was all attached, at the suit of several of his creditors, upon debts amounting to a large sum. On the same day, and immediately after the attachment of his property, he assigned his books of account and certain notes of hand to

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the defendant and William Belden. The defendant had a *bona fide* debt against him of about one hundred dollars, and had indorsed his note for five hundred dollars to the Chicopee Bank, some time previous, which note he has since been obliged to pay. Said assignment was on account of this debt and liability, so far as the defendant is concerned; and he has received under it the sum of $

"Said Belden was then (on the said 10th of December) in fact insolvent; but there is no other evidence, except as above stated, that he knew of his insolvency; and he testifies that he did not then intend to take advantage of the insolvent act, and that he did not in fact know of its existence. His insolvency was not known to the defendant."

R. A. Chapman, for the plaintiffs.

Ashmun, for the defendant.

DEWEY, J. The plaintiffs' claim arises under *St.* 1838, c. 163, § 10, wherein it is (*inter alia*) provided, that any assignment, by any debtor, of any part of his estate, which he shall make with a view to give a preference to any creditor, &c. if made in contemplation of becoming insolvent and of obtaining a discharge under the provisions of said statute, shall, as to his other creditors, be void, in like manner and to the same effect as conveyances made by any debtor to the intent or whereby his creditors may be delayed, hindered or defrauded, are now by law void as to such creditors; and the assignees, in such case, may by an action in their own names recover from the creditor, so preferred, the property so assigned, or the value thereof, for the use of the other creditors.

It is for the plaintiffs to bring their case within the provisions of this statute, if they would avoid this assignment, and receive the avails of it from the defendant. The burden is on the plaintiffs to show that the transfer was made by Belden in contemplation of his becoming insolvent and of obtaining a discharge under the statute.

It is conceded by the defendant, that Belden was in fact insolvent and unable to pay all his debts, at the time of making the transfer to the defendant. But mere insolvency and inability

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to pay one's debts, do not render void a transfer of property to secure a particular creditor. It must have been made by the debtor in contemplation of his becoming an insolvent debtor, under *St.* 1838, *c.* 163, and of obtaining a discharge under the provisions of that statute. While the debtor, in the ordinary course of business, and without any purpose existing in his mind to avail himself of the statue just referred to, is paying debts due to any of his creditors, or giving them collateral security for the same, such transactions are valid between the parties, and not liable to be set aside as in violation of this statute, although it may eventually be made to appear that, at the time of making such payments, or transfer as collateral security for his debts, the debtor was in fact insolvent and unable to pay his debts. It is the intentional unjust preference of one creditor to the other, after the debtor has the purpose of availing himself of the benefits of the statute, that renders such preference void. The inquiry will therefore necessarily be, in cases like the present, was the transfer in contemplation of insolvency and the obtaining of a discharge under the act of 1838, *c.* 163.

Upon the case stated by the parties, we cannot say this fact is shown affirmatively. The fact of an actual insolvency, and the other circumstances under which this assignment was made, are certainly calculated to excite suspicion as to the purposes of the debtor; but the testimony of the debtor is direct and full to the point that he did not, at the time of making the transfer to the defendant, intend to become an insolvent and obtain a discharge under the insolvent act; and that in truth he had no knowledge of the existence of any such statute. If this testimony be true, it is quite certain that the assignment to the defendant was not made by the debtor in contemplation of obtaining a discharge under the provisions of the statute, and the case therefore does not fall within it.*

In deciding upon a case stated by the parties, as the present one is, the court must take the testimony of the witnesses to be true, and deal with it as such. If the plaintiffs would have the

* New provisions on this subject have been made by *St.* 1841, *c.* 124, § 3.

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benefit of the other facts and circumstances disclosed in the case, to control the testimony of the debtor and discredit him, the case should have been submitted to the jury to weigh all the evidence and find the fact. But the case being presented to us upon this testimony, if we give it the full and proper effect which attaches to it, it negatives the unlawful intent to prefer one creditor under those circumstances which this statute prohibits and restrains. Such being the state of the case, the plaintiffs cannot maintain their action.

Plaintiffs nonsuit.

Amy Ranger *vs.* Jonathan Cary & others.

In an action by the indorsee against the maker of a negotiable note, the burden is on the defendant to prove that the note was negotiated after it was due and dishonored; and that burden is not removed by proof that the note was transferred and delivered to the plaintiff before it was dishonored, but was not indorsed until afterwards.

A note payable on demand is not regarded as dishonored within one month after its date.

Where a negotiable note, payable on demand, was transferred and delivered by the payee to a third person, within a month after its date, for a valuable consideration, but was not indorsed to him until two years afterwards; it was *held*, in an action by the indorsee against the makers, that they could not set off against said note a demand which was due to them from the payee at the time of the making of the note and of the transfer thereof by delivery.

Assumpsit on a promissory note for $60, made by the defendants, Cary, Ward & Bond, on the 21st of December, 1836, payable to Baxter Ayers or order, on demand, and by him indorsed to the plaintiff. The defendants pleaded the general issue, and filed the following specification of defence, viz. that said note, if made and indorsed as is supposed by the plaintiff, was not indorsed until the same was overdue and dishonored; and that said Ayres, at the time of making said note, was, and hitherto always has been, and now is, indebted to the defendants in a larger sum than the amount of said note, as by their account filed by way of set-off.

At the trial, in the court of common pleas, before *Williams*, C. J. the parties agreed that it should be taken by the court and

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jury as true, "that the note declared on was made as in the declaration alleged; that it passed, for a valuable consideration, into the hands of the plaintiff, soon after it was made — the precise time, if material, to be left to the jury; that it was not indorsed to the plaintiff, until the autumn of 1838; and that, at the time of making the note, and ever since, the said Ayres was indebted to the defendants in a sum over $500, which claim has been filed in offset." The defendants introduced the deposition of said Baxter Ayres, who deposed that in the autumn of 1836, he received, in exchange for a horse and wagon, the defendants' note for about $90, payable to a third person, and that within two or three weeks afterwards, the plaintiff, whom he owed about $60, called on him for payment, and he agreed that she should have a note of the defendants in payment of the debt due to her; that he afterwards took said $90 note to the defendants' counting room, and requested Ward, one of the defendants, to give him therefor two notes payable to himself, one for $60, and another for the balance; which was thereupon done: That he afterwards — but whether on the same day or some time afterwards, he could not say — passed the $60 note to the plaintiff, and took up a note which she held against him for about the same amount: That he did not then indorse said note, nor did the plaintiff request him so to do: That at the time of passing said note to the plaintiff, he was indebted to the defendants, on book account, between four hundred and five hundred dollars, very little of which has since been paid, and that he intended to have paid said note and taken it back; but that he said nothing on that subject to the plaintiff: That in a settlement of accounts between him and the defendants, in April, 1837, said Ward inquired for said note, and on being told that it was passed to the plaintiff he said he should not pay it; asked whether it was indorsed, and learning that it was not, desired the deponent to give the defendants a note of the same amount "to offset against the other, in case they had it to pay;" whereupon the deponent gave them a note for the same amount, including interest: That on the 24th of October, 1838, the plaintiff's

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brother called on the deponent to indorse to her the note now in suit, which the deponent did.

The above was all the evidence given to the jury, and the only question submitted to them was, whether said note was overdue and dishonored at the time of its transfer to the plaintiff.

"Upon this point, the judge instructed the jury, that the burden of proof was on the defendants, and unless the jury were satisfied affirmatively that the transfer of the note to the plaintiff was at least one month after its date, it could not, for the purposes of this trial, be considered as a dishonored note, and the plaintiff would therefore be entitled to a verdict. The judge further instructed the jury, that the transfer of said note was to be considered as made and completed, so as to vest the title in the plaintiff, when she paid the consideration therefor and it was in fact delivered to her, though the indorsement of said Ayers's name was not until long afterwards; and that the burden of proof still remained on the defendants, notwithstanding the evidence, contained in said deposition, as to the time of the indorsement, taken in connexion with the other evidence in the case."

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions to the above direction of the judge.

Forbes, for the defendants. A note payable on demand is to be regarded as dishonored, if not paid sooner than one month after date. *Field* v. *Nickerson*, 13 Mass. 131. *Thayer* v. *Brackett*, 12 Mass. 450. *Spring* v. *Lovett*, 11 Pick. 419. *Sylvester* v. *Crapo*, 15 Pick. 92. *Thurston* v. *M^c^Kown*, 6 Mass. 428. *Thompson* v. *Hale*, 6 Pick. 259. 3 Kent Com. (1st ed.) 61. 2 Stark. Ev. 255. *Sice* v. *Cunningham*, 1 Cow. 397. *Martin* v. *Winslow*, 2 Mason, 241. *Losee* v. *Dunkin*, 7 Johns. 70.

The legal title to the note was in Ayres until it was indorsed; and the indorsment did not relate to the time of transfer by mere delivery, so as to affect the defendants' right of set-off. 1 U. S. Digest, Assignment, 86, 89, 109. Jacob's Law Dict. Relation. Co. Lit. 150 *a*. Rev. Sts. *c*. 96, §§ 1, 10, 11. If the original agreement between Ayres and the plaintiff had been that the note should be indorsed, the plaintiff was guilty of laches in not procuring the indorsement earlier; and as the equities

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of the parties to this suit are equal, the defendants should prevail 1 Story on Eq. 75–77. See also *Drayton* v. *Dale*, 2 Barn. & Cres. 293. Bayley on Bills, (1st Amer. ed.) 79, 80. But there was no agreement that the note should be indorsed, and therefore the doctrine of relation does not apply.

The defendants are entitled to this defence, as the note was transferred to secure a *preëxisting debt* due to the plaintiff. *Rosa* v. *Brotherson*, 10 Wend. 85. *Ontario Bank* v. *Worthington*, 12 Wend. 593. *Coddington* v. *Bay*, 20 Johns. 637.

On the question of burden of proof, *Forbes* referred to *Stevens* v. *Bruce*, 21 Pick. 193.

Phelps, for the plaintiff. The transfer of this note, if made within a month after date, was within a reasonable time ; and what is reasonable time is a question of law. *Sanford* v. *Mickles*, 4 Johns. 224. *Sylvester* v. *Crapo*, 15 Pick. 92. *Thurston* v. *M^c^Kown*, 6 Mass. 428. The instructions of the judge as to the burden of proof were clearly correct. *Hendricks* v. *Judah*, 1 Johns. 319. *Webster* v. *Lee*, 5 Mass. 334. *Canfield* v. *Gibson*, 13 Martin, 143. *Pinkerton* v. *Bailey*, 8 Wend. 600. The evidence that the note was not *indorsed* till two years after the date, when taken in connexion with the proof that it was transferred and delivered *bonâ fide*, within a month after its date, did not change that burden. Delivery of a negotiable note to one who is ignorant of equities between the original parties, is an equitable indorsement ; and the subsequent clerical act of indorsement relates back to the time of delivery. *Baker* v. *Arnold*, 3 Caines, 284. *Smith* v. *Pickering*, Peake's Cas. 50. Bayley on Bills (2d Amer. ed.) 119. Ayres's receipt would not have availed as a defence against this note. *Collins* v. *Martin*, 1 Bos. & Pul. 650. *Wheeler* v. *Guild*, 20 Pick. 550.

It appears from *Smith* v. *Van Loan*, 16 Wend. 661, that in the case cited from 10 Wend. 85, the note was not an available security in the payee's hands at the time of the transfer, and that he put it into circulation fraudulently, contrary to an express agreement between him and the maker.

Dewey, J. The instructions of the court of common pleas, to which exceptions were taken, embraced substantially he fol-

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owing propositions: 1. That the burden of proof was on the defendants to show that the note was transferred after it was due and when dishonored, if they would avail themselves of a defence only open to them as upon a dishonored note: 2. That unless the defendants satisfied the jury that the transfer of the note to the plaintiff was at least one month subsequent to its execution, it was not a dishonored note, and the proposed defence could not avail: 3. That the transfer of the note must be considered as made and completed, so as to vest the title in the plaintiff, at the time when she paid the consideration thereof and it was in fact delivered to her, though the indorsement of the name of the payee was not placed upon the note until long afterwards: 4. That the burden of proof still remained on the defendants to show that the note was dishonored, notwithstanding the testimony of Baxter Ayres, and the other evidence, as to the time of the indorsement.

1. Upon the first point, the law is very fully settled according to the rule stated by the judge at the trial. A negotiable note being offered in evidence, duly indorsed, the legal presumption is that such indorsement was made at the date of the note, or at least antecedently to its becoming due; and if the defendant would avail himself of any defence that would be open to him only in case the note were negotiated after it was dishonored, it is incumbent on him to show that the indorsement was in fact made after the note was overdue.

2. The second point raised presents a question often brought to the consideration of the court, and upon which no very well defined and precise rule of a general character has been adopted. The general doctrine is sufficiently well settled, that as to a promissory note payable on demand, payment is to be demanded in a reasonable time; and if not demanded within such time, it is to be deemed overdue and dishonored. But what is a reasonable time, within which such demand must be made, can be said to have been ruled only in reference to particular cases, as they have occurred. The question has arisen in two classes of cases; the one, as to what was a reasonable time to make such demand, in order to charge an indorser; and the other, like that

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in the case before us, as to the length of time in which a note, payable on demand and remaining unpaid, would be held to be dishonored and subject to those grounds of defence which would have been open to the maker in a suit by the payee.*

The adjudicated cases in our own courts do not furnish any case approximating very closely to a period of time corresponding with the one under consideration. In *Field* v. *Nickerson*, 13 Mass. 131, the period of eight months was held not to be within a reasonable time to make a demand to charge the indorser; and in *Seaver* v. *Lincoln*, 21 Pick. 267, where the demand was made in seven days after the date of the note, it was held to be within due time. In *Sylvester* v. *Crapo*, 15 Pick. 92, a note that had remained unpaid for eleven months before it was negotiated, was held to be dishonored; and the shorter period of six months was, in *Thompson* v. *Hale*, 6 Pick. 259, held sufficient to subject it to the defence of a note overdue. On the other hand, a note indorsed seven days after its date was held, in *Thurston* v. *M'Kown*, 6 Mass. 428, to have been transferred in season to avoid any ground of defence arising from the equities between the original parties.

Without attempting to prescribe any precise limit beyond which such a note must be held to be dishonored, the court are of opinion that the term of one month, as stated in the instruction to the jury, was sufficiently restricted in point of time, and that if the note was transferred to the plaintiff within that period, it was not a dishonored note.

3. Upon the instruction that the transfer of the note was to be considered as made and completed, so as to vest the title in the plaintiff when she paid the consideration therefor and it was in fact delivered to her, although the actual indorsement was made long afterwards, we have not thought it necessary to decide further than as respects its bearing and effect upon the case now before us. And in reference to the defence here relied

* By St. 1839, c. 121, § 1, in actions by indorsees against the makers of notes *thereafter made*, payable on demand, any matter shall be deemed a legal defence, and may be given in evidence accordingly, which would be a legal defence if the action were brought by the promisee.

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upon, and the right to plead in offset such demands as might have been pleaded, if the action had been brought in the name of the payee, the court are of opinion that the indorsement, when made, should be regarded as relating back to the time when the plaintiff paid the consideration and the note was actually delivered to her; inasmuch as whether the plaintiff had the legal title from the time of the delivery to her of the note, or the equitable title merely, from the time of the delivery, and the legal title by a subsequent indorsement, the defence here relied on must be equally unavailing. Here is no question of want or failure of consideration, of this note; no offer to prove payment of it; but the defendants rely upon an account filed in offset, in their favor against Baxter Ayres, the payee and indorser of the note, as their only ground of defence to a recovery by the plaintiff.

It was originally a question of much doubt whether, in any case, where an action was instituted on a dishonored negotiable note, in the name of the indorsee, the defendant could avail himself, by way of set-off, of distinct demands he might have held against the indorser — the suit being between other parties than those to the account offered in offset, and the statute, which allows set-off, in its terms embracing only demands between the parties to the suit. The English decisions restrict the defence to a dishonored note within a much narrower ground than that relied on in the present case; holding the plaintiff, in such cases, liable only to the equities arising out of the note itself, or to the allowance of such demands due to the maker of the note as might be found by either express or implied understanding of the parties to have been agreed to be applied in discharge of the same. *Burrough* v. *Moss*, 10 Barn. & Cres. 558.

This court, however, after much consideration, in the case of *Sargent* v. *Southgate*, 5 Pick. 312, held that the statute of set-off was a remedial statute and ought to have a liberal construction; and that, in an action by an indorsee against the maker of a negotiable note indorsed when overdue, the maker might file in offset demands he had against the indorser for money due. In that case, the note remained in the possession of the payee

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long after it was dishonored, and the case presented itself under circumstances of equitable defence much stronger than in the case at bar. In *Stockbridge* v. *Damon*, 5 Pick. 223, where a note was transferred six years after it was due, and where the indorsement was obviously in fraud of the maker's rights, the court also allowed the demands of the maker against the payee to be given in evidence to defeat a recovery on the note. But the construction of the right of set-off, thus liberal for the suppression of fraud, should not be extended so as to work injustice to a *bonâ fide* holder of a note, who became possessed thereof for a valuable consideration, before it was dishonored, and when by subsequent indorsement the legal interest has become vested in him, so that he may enforce the collection of it in his own name.

In the case of a note not negotiable, transferred to a third person, it is, from the very form and nature of the contract, a chose in action to be enforced solely in the name of the payee; and until actual notice of transfer, the law requires that all payments and offsets, which may be properly applicable to the same, should be allowed. Not so in the case of a negotiable note, which by its very terms shows that the promise is the subject of transfer and sale, and where no notice of transfer would have been required to be given to the maker, if there had been an actual indorsement before the note was overdue. It is true that in respect to such a note, if there were an attempt to enforce it without indorsement, and in the name of the payee, it might be defeated by an offset, if no notice had been given; but when, by indorsement, the equitable transfer has become a legal one, the case may present itself under a different aspect as to the legal rights of the parties.

If this note had remained in the possession and control of the payee until dishonored, or if it had been fraudulently indorsed to avoid the offset of the makers' demands against the payee, we should have had no hesitation in applying the rule as stated in the cases above cited, and sustaining the defence. But this case shows a *bonâ fide* sale of the note before it was dishonored, for a valuable consideration, and an actual delivery of the

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same to the plaintiff, and her possession thereof to this time, and her subsequent acquisition of the legal title by indorsement. If this indorsement had in form been made before the note was dishonored, no question could have been made as to the right of the plaintiff to recover. Having become possessed of the same, at the time and in the manner she did, and having, before the institution of her suit, acquired the legal title, and consequently the right to sue in her own name, the court are of opinion that the plaintiff does not hold this note subject to the demands filed in offset, and to which it would have been liable while in the hands of the payee; and that, for this reason, the defence relied on cannot prevail.

4. In the view we have taken of this case, we perceive no objection to the ruling of the judge, that the burden of proof remained on the defendants, notwithstanding the evidence contained in the deposition of Ayres as to the time of the indorsement, taken with the other evidence in the case. The question was, whether upon the whole evidence the defendants had shown that the transfer of the note to the plaintiff was made under such circumstances, that the demands of the defendants against the payee of the note were admissible in defence, in the present action. The evidence referred to discloses, in connexion with the time of the actual indorsement, the delivery of the note, for a valuable consideration, to the plaintiff, at a period before the note was dishonored. The burden of proof being originally on the defendants, to show that the note was transferred under such circumstances as would authorize the proposed defence, we do not see that this burden was shifted upon the plaintiff, but think it remained on the defendants.

Exceptions overruled.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF WORCESTER, SEPTEMBER TERM 1840. AT WORCESTER.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE,
HON. SAMUEL PUTNAM,
HON. SAMUEL S. WILDE,
HON. CHARLES A. DEWEY,
} JUSTICES.

LEONARD STONE *vs.* EBENEZER CLARK.

Where a deed, conveying land, is of doubtful construction as to the boundaries, the construction given by the parties themselves, as shown by their acts and admissions, is deemed to be the true one, unless the contrary be clearly shown.

Parol evidence of the practical construction given to a deed, by the parties thereto, is admissible when the language thereof — especially in the description of the land conveyed — is doubtful.

WRIT of entry to recover thirty-three acres of land in Oxford, called the Butler lot. The demandant counted on his own title in fee and in mortgage, and claimed as assignee of two mortgages, one made in 1801, and the other in 1806, to Andrew Sigourney, by Sylvanus Learned.

Several questions were raised, at the trial before the chief justice, and were argued at the September term, 1839; but as the case was decided solely on a question of boundary, the facts, on which the other questions arose, are here omitted.

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It was proved at the trial, that when the said mortgages were made by Sylvanus Learned, he owned several contiguous parcels of land, including the Butler lot, conveyed to him by his father, Ebenezer Learned, in the years 1786, 1789 and 1796, the Butler lot being conveyed in the latter year, by a separate deed.

The further facts, on which the decision turned, and the description given of the land, in the two mortgage deeds, are set forth in the opinion of the court.

Washburn, for the demandant.

Barton, for the tenant.

WILDE, J. In this case several questions, of more or less difficulty, have been submitted, the principal one being a question of boundaries, depending on the construction to be given to the mortgage deeds, under which the demandant claims title The first of these deeds, from Sylvanus Learned to Andrew Sigourney, is dated in 1801 ; and the land mortgaged is thus described : " A certain farm or tract of land, lying in the northerly part of Oxford, containing by estimation two hundred acres, be the same more or less, bounded west on land of Ebenezer Learned, north by Jacob Works, east by a town road and Reuben Lamb, and south by the land of Asa Conant to the west line first mentioned."

The second deed from said Learned to said Sigourney is dated in 1806, and the land then mortgaged is described as follows : " A certain farm or tract of land with the buildings thereon, lying and being in the northerly part of Oxford, containing by estimation two hundred acres, be the same more or less, bounded westwardly on the late Ebenezer Learned's farm, north on Jacob Works, easterly on a town road, Israel Stone and others, and southerly on the late Asa Conant's farm."

The descriptions of the land conveyed by the two deeds are not precisely similar ; but undoubtedly the same tract of land was intended to be described in both deeds. The question is whether the Butler lot, which is now demanded, be embraced by these descriptions. The difficulty of construction arises

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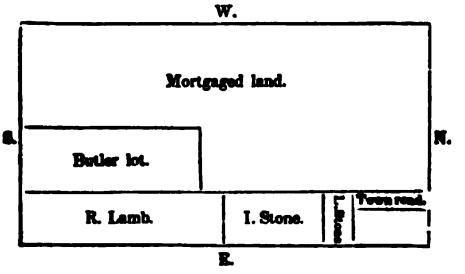
from the imperfect description of the easterly line of the lot mortgaged.*

By the first deed the land conveyed is bounded easterly by a town road, and Reuben Lamb. And by the second deed, the same is bounded easterly by a town road, Israel Stone, and others. Both descriptions of this line are defective, but are correct as far as they go, whether the Butler lot be included or not. In either case, the land is bounded easterly by a town road, and by lands of Reuben Lamb, and Israel Stone, and also by land of Luther Stone, as appears by the survey, and the testimony of the surveyor. By his testimony also it appears that the farm mortgaged, exclusive of the Butler lot, was commonly called the old Learned farm, and was always separated from the Butler lot by a fence: And that it measured one hundred and ninety-one acres and sixty-one rods, which nearly corresponds with the measure as estimated in the two deeds. This evidence favors the presumption that the Butler lot was not intended to be included in the mortgages; and the presumption is fully confirmed by the other evidence in the case.

When the construction of a deed is doubtful, great weight is to be given to the construction put upon it by the parties, especially in doubtful questions of boundaries, which must be presumed to be within their knowledge. When both parties, therefore, agree as to the boundaries and lines of a lot, they must be taken to be the true boundaries and lines, unless the contrary can be clearly shown. In the present case it was conclusively proved that, by the construction given to the mortgages by the

* The sketch below will show the eastern boundaries of the land mortgaged



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parties, the Butler lot was not included. In 1810, Sylvanus Learned mortgaged this lot to James Butler, which mortgage was afterwards discharged; and in 1818, the said Learned conveyed the same lot to the said Butler in fee, with covenants of seizin and warranty, and that the premises were free of all incumbrances. The grantee entered under that deed, and the tenant holds by sundry mesne conveyances from him. No claim has been interposed, until recently, to this lot, by Sigourney or by any one claiming under him; but the tenant, and those under whom he claims, have had seizin and possession of the premises ever since the time of the execution of the last deed to Butler.

In 1821, Sigourney, the mortgagee, entered for condition broken on the farm, exclusive of the Butler lot, and thereupon leased the premises to Abisha Learned, the agent and attorney of the mortgagor, for the term of three years. And by this lease the premises are bounded easterly on James Butler, Israel Stone and a town road.

This evidence shows clearly the understanding and intention of the parties, according to which the Butler lot was not included as a part of the mortgaged premises. This construction of the mortgage deeds, thus expressly admitted by the repeated acts of the parties, must be deemed the true construction, unless it be repugnant to the descriptive language of the conveyances. And it is manifest that there is no such repugnancy. The easterly and indeed the southerly lines of the mortgaged premises are imperfectly described; but so far as they are described, the description is sufficiently correct.

It was objected, in the argument by the demandant's counsel, that the parol evidence of the acts of the parties was not admissible. But there is no ground for this objection. When the language of a conveyance is unambiguous, no parol evidence to vary or control its import is admissible. But where the language is doubtful, especially in the description of the land conveyed, there evidence of the practical construction by the parties is admissible to explain and remove the doubt. 3 Mass. 362. 10 Mass. 149. 16 Pick. 239. 1 T. R. 701. Besides,

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in the descriptive parts of the two mortgages, there was a latent ambiguity, which clearly authorized the admission of the parol evidence.

Upon the whole matter, therefore, we are of opinion that the Butler lot was not included in either of the mortgages from Learned to Sigourney, and consequently, according to the agreement of the parties, the demandant is to become

Nonsuit.

EMERSON W. GOULD *vs.* CLARISSA GOULD.

Under the Rev. Sts. *c.* 76, § 12, a libel for a divorce, filed by a libellant of sound mind, &c., cannot be sustained, if it be signed by his attorney, although the attorney was specially empowered by him to sign it.

LIBEL for a divorce, signed "E. W. Gould, by his attorney, D. Brigham." The libellant resided in Missouri, and had executed a letter of attorney to Brigham, containing a special authority to prosecute for a divorce, and to sign the libel. By the Rev. Sts. *c.* 76, § 12, it is provided that every such libel "shall be signed by the libellant, if of sound mind, and of the age of legal consent to a marriage."

THE COURT held that this provision, taken in connexion with former decisions and practice, was too explicit to admit of doubt that the libel must be signed personally by the libellant. See *Willard* v. *Willard*, 4 Mass. 506 *Winslow* v. *Winslow*, 7 Mass. 96.

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Inhabitants of Sutton *vs.* Inhabitants of Dana.

Where a verdict, which is decisive of the case, is found on one or more of several issues, and the jury cannot agree as to another issue, the party, in whose favor the verdict is found, may waive the other issue, or consent that a verdict be entered thereon against him.

Parts of different towns were formed into a new town, with a provision that the new town should support all the poor who had their legal settlement in either of the towns from which it was formed, and who had removed therefrom, and whose dwelling-place or home was, before such removal, within the limits of the new town. *Held*, that this provision did not include those poor who had removed from the limits of the new town into another part of the same old town, and from thence into another town; but included those only whose *last* dwelling-place or home, previous to such removal, was within the limits of the new town.

Assumpsit to recover expenses incurred by the plaintiffs in the support of Lucy Malcomb, a pauper.

At the trial, before *Dewey*, J. the parties agreed the following facts: Said Lucy was the daughter of Daniel Chase, who, before the year 1770, resided many years on a farm in the north part of the town of Greenwich, and died there in that year, having acquired a settlement in that town, by such residence. On the 7th of April, 1772, Isaac Powers, whose residence was always in the territory which is now Greenwich, was appointed guardian of said Lucy, who was then a minor. In February, 1801, the town of Dana was incorporated, including within its limits the aforesaid farm of Daniel Chase. On the 7th of March, 1791, said Lucy intermarried with Michael Malcomb of Orange, who was an inhabitant of that place in 1783, when it was incorporated as a district.

As to certain other facts, concerning which the parties did not agree, the jury were instructed to return an answer to three questions: "1st. Did Lucy Malcomb reside with Isaac Powers, as her home, after the death of her father? 2d. Did she reside with said Powers, as her home, after his appointment as her guardian? 3d. Was Michael Malcomb seized of an estate of freehold, situate in Orange, of the clear annual income of ten dollars, he residing thereon and occupying the same, in person, for the space of two years, between the 23d of June,

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1789, and the 11th of February, 1794?" The jury returned an affirmative answer to the two first questions, but could not agree upon an answer to the third. Whereupon the defendants consented that a verdict should be returned for the plaintiffs on the third question, (i. e. answering it in the negative,) and caused it to be so entered on the clerk's docket.

It was "agreed by the parties, that if the defendants have a right to have the third issue found by the jury for the plaintiffs, or may waive the same, and take a verdict on the two issues found in their favor, then the facts so found are to be considered as agreed by the parties, and the court will render judgment for the plaintiffs or defendants, as the whole facts agreed shall demand."

It was admitted at the argument, that said Lucy Malcom left Greenwich at the time of her marriage.

Barton, for the plaintiffs.

Brooks, for the defendants.

Dewey, J. The parties, with a view of making a case and presenting to the whole court the questions of law arising thereon, proposed to submit certain specific questions of fact to the jury, with the understanding, that the facts so found were to be made a part of the case to be stated. All the questions put to the jury respected the existence of certain facts alleged by the defendants in their defence, and denied by the plantiffs. As to two of the issues, the jury returned their verdict in favor of the defendants; and as to the third, they could not agree on a verdict. The defendants subsequently filed in the case their consent in writing, that the verdict of the jury might be entered for the plaintiffs on the third issue.

The first question in this case is, whether the defendants had a right to waive the third issue, or to concede it as found for the plaintiffs, and avail themselves of the finding of the jury in their favor on the other issues. If the question submitted to the jury, and on which they were not agreed, had been as to any facts upon which the plaintiffs relied to maintain their action, most clearly no further proceedings could be had until that issue should be found by the jury; but as it presented simply

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one of several grounds of defence relied upon by the defendants, and was entirely unconnected with the other issues, and could have had no effect on the finding as to those issues, we think it was competent for the defendants to waive that issue; and especially it would seem a sufficiently favorable disposition of it, as respects the plaintiffs, that it should be taken, in the further proceedings in the case, as upon a verdict duly found for the plaintiffs. The verdict of the jury, upon the two issues in favor of the defendants, can only avail them upon the hypothesis, that the facts found in their favor are decisive of the case, and that the other issue has therefore become immaterial. If this be so, there seems to be no good reason why the defendants should not have the benefit of the finding of the jury. The case of *French* v. *Hanchett*, 12 Pick. 15, furnishes a precedent in point. That was a case where several of the issues joined had not been found by the jury; but the court held, that where the position of the case is such that the finding of one or more of the issues is decisive of the case, and renders the other issues immaterial, the verdict may be taken, and the jury discharged of the case, whether the parties do or do not consent.

The next inquiry is, whether upon the facts found this action can be maintained. Have the plaintiffs established the settlement of the pauper in the town of Dana? Without taking into consideration the other grounds of defence to the action, it seems to us, that the plaintiffs must fail to sustain their action, from their inability to establish, at any time, the legal settlement of Lucy Malcomb in Dana. They do not bring the case within the provisions of *St.* 1800, *c.* 50, incorporating the town of Dana, and prescribing the liability of that town for the support of such poor persons as might have had their legal settlement in either of the three towns, from portions of each of which the new town of Dana was formed. This statute prescribes that "the inhabitants of Dana shall support all the poor who had their legal settlement in either of said towns of Petersham, Hardwick, or Greenwich, and are now removed therefrom, and have not gained a settlement elsewhere, and whose dwelling-

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place or home was, before such removal, within the limits which now constitute the town of Dana."

Daniel Chase, the father of the pauper, resided in that part of Greenwich which was afterwards included in the town of Dana; and if the residence of the pauper with him had been her last dwelling-place and home, before her removal from Greenwich, the case would have been within the provisions of the statute, and the liability of Dana for her support would have been established, unless the defendants could have shown that she subsequently acquired a new settlement. But it appears that Daniel Chase died in 1770, and subsequently to his death the pauper removed to another part of Greenwich, distinct from that which was afterwards incorporated as a part of Dana, and resided, as her home, with one Isaac Powers, and was there residing at the time of her removal from Greenwich. We think that upon this state of facts, the town of Dana is not chargeable, under the statute before cited. The statute must be construed to refer to a case where the *last* dwelling-place or home was within the limits of the new town. In this view of the case, it becomes unnecessary to decide whether the pauper subsequently acquired a new settlement, by her marriage with **Michael Malcomb.**

Judgment for the defendants.

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Samuel Wood *vs.* Cyrus Leland & others.

A surety's cause of action against a co-surety or his representatives, for contribution accrues when, and not before, he pays the debt of the principal.

One of two sureties, who has paid the debt of the principal, and files a bill in equity, for contribution, against the heirs of his co-surety, and causes all of them, who are within the reach of process, to be summoned, is entitled, by the Rev. Sts. *c.* 70, to a decree against them severally for such equal sums as amount, in the aggregate, to a moiety of what he has thus paid, though there are other heirs who are not summoned.

If one of such heirs, thus summoned, die pending the suit, his administrator is to be summoned in, and the same decree will be passed against him, that would have been passed against his intestate.

This was a bill in equity, filed by a surety who had paid the debt of his principal, to compel contribution by the heirs at law of his co-surety. The facts, as collected from the bill and answer, and the points discussed by counsel, sufficiently appear in the opinion given by the chief justice.

Newton, for the plaintiff.

Washburn, for the defendants.

Shaw, C. J. In this suit, the plaintiff claims a contribution against the defendants, as heirs at law or devisees of their father, Cyrus Leland, deceased. It is agreed, as a fact in the case, that the defendants received, respectively, about $ 900 each, of their father's estate, and more than enough to answer the plaintiff's demand, on either of the principles of computation suggested by the parties. The plaintiff and the defendants' ancestor were both sureties, on bonds given by one Harrington in 1819, upon his appointment as guardian of Catharine Kimball and Oliver Kimball, minors. It appears that Cyrus Leland, the defendants' ancestor and the plaintiff's co-surety, died in September, 1830; administration was taken on his estate in Novem ber, 1830, and of course was closed four years after, in November, 1834, which was before any breach happened upon the guardianship bond. Of course, no action could be brought upon the bond against the administrator, and therefore by the provisions of the Rev. Sts. *c.* 70, § 13, the heirs or devisees and legatees of the estate, to the amount of the assets thus re-

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ceived, and under certain limitations, were liable for the debt By § 14 of the same chapter, no suit shall be thus maintained, unless commenced within one year after the time, when the right of action shall first accrue.

The first question arises upon this limitation. It appears that Catharine Kimball, one of said minors, came of age, and intermarried with one Henry T. Grout; that some ineffectual efforts were made to obtain a settlement of the guardian, after which he was regularly cited into the probate court, and settled his account, exhibiting a large balance of the property of the ward in his hands in January, 1837. On the same day, a demand was duly made on the guardian for that balance, who neglected paying it. Here was undoubtedly a breach of the bond, on which the party in interest had a right of action against the plaintiff as surviving surety, and against the heirs, devisees and legatees of the deceased surety, as well as against the principal. The plaintiff in fact was not compelled to pay, and did not pay the amount of such balance, until November, 1838, which was more than one year after the breach of the condition of the bond. Now the defendants contend that as they could not be held responsible to the obligee for such breach of the bond, after one year, so they would not be held liable for a contribution to a surety, after that time. But the court are of opinion, that the statute of limitations cannot be so applied. It may well be admitted, that the statute of limitations would be a good bar to an action by the obligee against the heirs and legatees; but the right of action by the surety for contribution does not accrue at the breach of the bond, but upon his payment of the money, pursuant to that breach. The suit against *him* is not barred in one year. Besides, such suit may be brought within the year, but not come to judgment till long after the year; and he cannot be compelled to pay, until judgment is recovered, although he may pay sooner on demand, after a breach, if he choose to do so. But his right of action for contribution, arises when he does pay, and not before. Notwithstanding a breach, the debt may be paid by the principal, or relinquished, or compromised, and the surety never compelled to

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pay. If so, he never has a cause of action against the co-surety or his representatives. The right of action grows out of the original implied agreement, arising out of there being co-sureties, that if one shall be compelled to pay the whole or a disproportionate part of the debt, for which both thus collaterally and provisionally stipulate to be liable, the other will pay such a sum, as will make the common burden equal; and in case of the death of either, this obligation devolves upon his legal representatives. This suit being brought within one year from the time of the payment of the money by the plaintiff, is not, we think, barred by the statute of limitations.

Another question is, for what sums the defendants, who have been served with process, shall each be liable. The estate was divided amongst nine children, six of whom were within the reach of the process of the Commonwealth, and were duly summoned; one of whom has died pending the suit. The plaintiff claims to recover the whole, from those who are summoned, without regard to the three absent parties; but the defendants insist that if liable at all, it is only for an aliquot part, of *one ninth* each. We think this question is answered by the Rev. Sts. already cited, *c.* 70, § 16. "In case there be more than one person liable for the debt, the creditor may recover the same in a bill in equity against all the persons so liable, or as many of them as are within reach of process." This seems conclusive for the plaintiff. By other provisions, those who pay more than their shares of such common debt may have their remedy over against those equally liable; but it is sufficient for the plaintiff, that he has now summoned all those who are within the reach of process, and that those whom he has summoned have assets, by descent or by will, to pay him.

In the case of the one who deceased pending the suit, we think the administrator ought to be summoned in, there being an express provision, Rev. Sts. *c.* 70, § 15, that in such case the executors and administrators of such heir or devisee, shall be held liable therefor as for his proper debt.

After such administrator shall have been summoned in, the plaintiff will be entitled to a decree, that the several defendants

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pay him each one sixth of a moiety of the two sums paid by him, as such surety, with interest from the time of payment to the time of the decree, with costs.

PETER B. BRIGHAM & others *vs.* FITCH WINCHESTER.

Where a testator, at the time of making his will, (before the Rev. Sts. took effect) held land in mortgage, and devised all his real estate, and afterwards foreclosed the mortgage, it was held that such land did not pass by the will.

WRIT of entry to recover a tract of land in Southborough, called the Bellows farm. The demandants were the heirs at law of Alpheus Fay, and claimed title by descent from him. The tenant claimed title as devisee of said Fay.

At the trial, before *Dewey*, J. it appeared that Ebenezer Bellows, on the 26th of March, 1814, mortgaged the demanded premises to said Fay, to secure payment of certain promissory notes; and that said Fay, on the 23d of August, 1823, entered upon said premises for condition broken, and, under said entry, foreclosed the mortgage. On the 28th of April, 1823, said Fay made his last will, by which, after certain bequests, he devised to the tenant all the rest and residue of his estate, real, personal and mixed. Said Fay died in October, 1830, and his said will was proved and allowed in the following December.

The judge ruled that the demanded premises did not pass to the tenant by the will, and a verdict was returned for the demandants, subject to the opinion of the whole court.

Washburn, for the tenant.

Newton and *C. Allen*, for the demandants.

DEWEY, J. The demandants claim as heirs at law of Alpheus Fay, and their right as such to recover their proportionate share of the demanded premises is undoubted, unless the same have passed to the tenant as residuary devisee under the will of said Fay. The terms of the devise are quite sufficient to pass all the undevised property which said Fay then possessed, being

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a devise to the tenant, his heirs and assigns, of all the rest and residue of said Fay's estate real, personal and mixed. Under this devise, the notes of Bellows, which Fay then held, and also the mortgage given to secure payment of the same would have passed to the tenant, as residuary devisee, had they remained unchanged in their character until the death of the testator. Thus far there is no question between the parties as to what would have been their legal rights. But it is now urged by the demandants, that after the making of the will, and before the death of the testator, the notes of Bellows had ceased to be evidence of a debt, and the mortgaged premises were no longer held as security for the payment of money; but the same had become absolutely vested in the testator, as an indefeasible estate in fee, and after this period the demanded premises are to be considered as real estate, and necessarily to be treated as real estate acquired after the making of the will. The demandants then rely upon the familiar rule of law, that to give effect to a devise of real estate, the testator must be the owner thereof at the time of making the devise, as well as at the time of his decease; and that it must be the same interest at these different periods of time. This rule is well settled, and must be applied in all cases not affected by § 3, c. 62, of the Rev. Sts., which has materially changed the law, as to subsequent devises, providing, as it does, that an interest acquired in lands by the testator, after the making of his will, shall pass thereby, if such shall clearly appear, by the will, to have been the intention of the testator.

That the testator became the owner of the land in controversy, by a good indefeasible title, in August, 1826, is conceded by all parties. But the tenant contends that there has been no such change in the estate as should defeat his rights as a residuary devisee. The position taken is, that the legal estate in the premises was in fact vested in the testator by the execution of the mortgage, liable only to be defeated by the performance of the condition of the mortgage, and therefore he was seized of the same estate at the time of making his will, and at his death. It is true that as between mortgagor and mortgagee, it has been

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the language of the books, that the legal seizin is in the mortgagee before condition broken; yet it is also said, that as to all other persons the mortgagor is considered the owner of the land. And so also as to the interest of the mortgagee, the doctrine is, that as to most purposes his estate is a mere chattel interest, following the nature of the debt secured by the mortgage. There is no attachable interest in the mortgagee, and the mortgagor may convey by deed his interest, and he may sue in trespass any stranger for wrongful entry into the land. The law of mortgage, modified as it has been by our statutes regulating the legal rights of the parties thereto, has certainly limited very much the practical application of the technical rule, that the legal estate is in the mortgagee. *Goodwin* v. *Richardson*, 11 Mass. 469. *Fay* v. *Cheney*, 14 Pick. 399. *Eaton* v. *Whiting*, 3 Pick. 488.

It seems to us that the principles which have been recognized in several cases, before this court, in relation to the character and nature of the estate of mortgagees before foreclosure, must be decisive of the present case. Upon the hypothesis that the mortgagee was seized of the legal estate, and that it would, therefore, descend to his heirs at law upon his death, without any foreclosure, a writ of entry was brought by the heirs at law of the mortgagee, counting on their own seizin in fee and mortgage, in the case of *Smith* v. *Dyer*, 16 Mass. 18; but it was held, that under our laws, no such estate vested in them, as would authorize such an action. *Parker*, C. J. in his opinion, particularly adverts to the effect necessarily resulting from our statutes in changing the common law doctrines as laid down by Judge *Trowbridge*, (8 Mass. 554,) in his reading on mortgages. And he adds, "until foreclosure, the estate is considered in law to be a pledge for the debt, and on the death of the mortgagee it is to be treated as a debt." Nor would the mere entry for foreclosure by the mortgagee so fix the character of the estate as to make it transmissible by descent to the heirs, as real estate, if the mortgagee die before the equity of redemption is barred. *Dewey* v. *Van Deusen*, 4 Pick. 19. *Fay* v. *Cheney*, 14 Pick. 399. The opinion in the case last cited, as delivered

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by *Shaw*, C. J. presents strongly the views of this court as to the essential change in the estate of the mortgagee by the foreclosure. It is said "the lien is converted into an estate; the pledge is changed into an irredeemable and indefeasible interest; the debt is paid and extinguished by an absolute transfer of the estate; the foreclosure substantially changes the mortgage from the personal to the real property of the mortgagee." If these remarks are sound, then most clearly the testator did not have the same estate in the demanded premises at the time of his death, which he had at the time of making his will. Also in the case of *Goodwin* v. *Richardson*, before cited, it is said by *Jackson*, J., that "the foreclosure operates as a new purchase by the mortgagee."

But the question presented by the case before us has been even more directly the subject of judicial remarks in the case of *Ballard* v. *Carter*, 5 Pick. 115, where this point was much discussed in the very elaborate opinion of the late chief justice *Parker*; and the general doctrines there stated seem to settle the whole matter very fully. It is true that case might have been decided in favor of the heirs at law upon somewhat narrower ground, as there was not only a title under the mortgage, but after the making of the will the testator took an absolute deed from the mortgagor of the premises of which he had held the mortgage. And this difference in the state of facts, in the two cases, has been the occasion probably of presenting again this question to the consideration of the court.

Upon reviewing the question here presented, and examining again the many authorities bearing upon it, we have, however, found no reason to doubt the correctness of the legal principle applicable to it, as stated in *Ballard* v. *Carter*; and are, therefore, of opinion that the premises demanded in this writ did not pass to the tenant as residuary devisee of Alpheus Fay, as the said Fay, after the making of his will, and before his death, had by foreclosure of his mortgage changed his interest in the estate from that of mortgagee to that of owner of an indefeasible estate.

Judgment on the verdict.

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Clark Sumner *vs.* Ellis Sumner, Executor.

Where a promissory note, made and delivered as a settlement of a demand barred by the statute of limitations, is given up to the maker by the payee, for the purpose of restoring all matters between the parties to the state they were in before the note was given, the act of making and delivering such note is not competent evidence to take the original demand out of the operation of said statute. *Aliter*, it seems, if it be given up for the purpose of leaving open the question of the amount due to the payee, and not the question of the maker's being indebted to him.

Assumpsit to recover for services rendered to the defendant's testator, Ebenezer Sumner, the plaintiff's father, during eighteen years next preceding his death. Defence, the statute of limitations.

The plaintiff, at the trial, before *Dewey*, J. gave evidence tending to show that the alleged services had been performed, and also to show the value thereof. It was also in evidence that five days before the testator's death, viz. on the 15th of February, 1837, the plaintiff made a claim on him, and the testator expressed a willingness to settle with the plaintiff, and thereupon called a meeting of his children to assist in such settlement: That after the separation of the family, on the evening of the same day, the testator agreed to meet the plaintiff on the next day and settle with him, and did accordingly meet him and give him a note for $1000, which sum he afterwards told his daughter he was satisfied was due to the plaintiff: That the plaintiff, being afterwards informed that one of his brothers was dissatisfied, carried the note to his father and gave it to him, saying that he would give it up, and would not keep it, as it made difficulty in the family. At the same time, he received a paper from his father.

There was no other evidence that the testator had acknowledged that he owed the plaintiff, or had promised to pay him, within six years next before the testator's death, except certain verbal declarations made after October 1st, 1834.

The judge instructed the jury, that if the note was given up to the testator for the purpose of restoring all matters between the parties to the state in which they were before the execution

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of the note, the making and delivery of the note to the plaintiff would not avoid the operation of the statute of limitations; but if the jury should find that the note was given back to the testator for the purpose of leaving open the question of the value of the plaintiff's services, and not the question of the testator's being indebted to him, then the giving of the note was competent evidence to take the case out of the operation of said statute, as to the services for which the note was given.

A verdict being found for the plaintiff, the defendant filed exceptions to the foregoing instructions.

C. Allen, for the defendant. The note, though a promise in writing, did not remain, after it was given up, as evidence which will take the case out of the statute of limitations. If the parties agreed that it should remain as evidence of a debt, they agreed by oral declarations only, which are of no avail. No case can be found in which written evidence, voluntarily destroyed, was ever allowed to operate, or where its non-production was excused. Besides, there was no proof, in this case, that any such agreement was made, as the instructions of the judge supposed.

Washburn, for the plaintiff. The 13th section of *c.* 120 of the Rev. Sts. is a transcript of the 1st section of Lord Tenterden's act, 9 Geo. IV. *c.* 14; and the object of both statutes was the same. In *Dickenson* v. *Hatfield*, 5 Car. & P. 47, Lord *Tenterden* said the object of the English statute "was to procure that in writing, for which words were previously sufficient." In *Haydon* v. *Williams*, 7 Bing. 166, 167, *Tindal*, C. J. says, "the statute did not intend to make any alteration in the legal construction to be put upon acknowledgments or promises made by defendants, but merely to require a different mode of proof; substituting the certain evidence of a writing signed by the party chargeable, instead of the insecure and precarious testimony to be derived from witnesses." In this last case, and in *Lechmere* v. *Fletcher*, 1 Crompt. & Mees. 623, and also in *Bird* v. *Gammon*, 3 Bing. N. R. 883, it was held that a written acknowledgment took the case out of the

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statute of limitations, though no sum was mentioned in the writing.

No form of written promise is prescribed by the statute. In *Barnard* v. *Bartholomew*, 22 Pick. 291, a letter was held sufficient. So in *Dabbs* v. *Humphries*, 10 Bing. 446, and in 7 Bing. 1 Crompt. & Mees. and 3 Bing. N. R. *ubi sup.*

It is not necessary to produce the written promise. It is sufficient, if it be proved that such a promise was made, and is not within the plaintiff's control at the time of the trial. *Haydon* v *Williams*, 7 Bing. 163.

Whether the note, on being given up, became as if never given, depends on the intention of the parties. The instructions of the judge were therefore right on this point.

Dewey, J. This case was put to the jury, under the instructions above stated, for the purpose of giving the plaintiff the benefit of all inferences the jury might properly draw from the evidence, and thus to present the question as to the competency of this evidence to avoid the effect of the statute of limitations, in the most favorable view which the law would authorize.

All the evidence of verbal acknowledgments of indebtedness, given in the course of the trial, however full and unequivocal they may be, are of no avail; the Rev. Sts. c. 120, § 13, having provided that an acknowledgment or promise, to be effectual in taking a demand out of the operation of the statute of limitations, must be contained in some writing signed by the party chargeable thereby.

The court perceive no objection to the instructions given, as not being entirely correct as general principles, and such as under competent evidence would have authorized a jury to find a verdict for the plaintiff; but upon looking at the evidence on this point, which lies in a very narrow compass, and taking all the facts to be true as disclosed in the plaintiff's evidence, it seems to us that, as matter of law, it is the duty of the court to say that there was no sufficient evidence of any acknowledgment or promise in writing, signed by the party to be charged thereby, to avoid the effect of the statute of limitations; and that the note, which alone is relied upon as such evidence, having been

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given up to the maker by the payee, without any condition or reservation, the parties were restored to the same state of things as existed before the making of the note, and that it could not therefore be competent evidence of any acknowledgment or new promise.

Had this note been retained by the plaintiff, it would of itself have furnished a good cause of action, and all questions as to the statute of limitations would have been avoided. But the case finds that the plaintiff, after the making and delivery of the note to him, in consequence of the dissatisfaction expressed by one of his brothers, as to the settlement and giving of the note by their father, carried the note to the maker, and gave it to him, saying that "he would give it up; that he would not keep it, because it made difficulty in the family." What is the natural inference to be drawn from the fact of thus giving up the note? Is it not to be taken as a voluntary relinquishment of all liabilities arising therefrom? Here was an exchange of papers, each party surrendering the contract or written promise of the other; for although it is not distinctly found, yet it may be reasonably presumed, that the paper, given up by the father to the plaintiff, was a receipt he had taken from the son, at the time of making the note to him.

It was certainly competent for the parties to have made such an arrangement as is supposed in the issue presented to the jury under the instructions from the court, on the trial. There might have been a conditional, or more properly a limited, discharge of the rights of the plaintiff upon this note; a holding of it for the sole purpose of retaining the written acknowledgment of the maker, and yet under an agreement that the amount thereof should be reduced by an indorsement thereon, if, upon further examination, it should be found that the service had been computed at too high a rate. To effect such an arrangement, however, it would seem the more proper way to have placed the note in the hands of a third person to be held for all parties, and subject to the stipulated conditions. But the difficulty in the case is the want of any evidence of any limitation or condition in the surrender of the note by the plaintiff. It was uncon-

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ditional equally upon the question of indebtedness more than six years preceding, as upon the question of the value of the services. There seems to have been no reservation. The plaintiff insists that this note having been shown once to have been in existence, although afterwards surrendered, is sufficient evidence of an acknowledgment in writing of the indebtedness as to the demand sought to be recovered in this action; but, as it seems to us, it is not competent to the plaintiff to rely upon this instrument which was cancelled by mutual consent, for the causes already referred to, and now to make it the substantial cause of action, though under another form.

Verdict set aside, and a new trial ordered.

FREDERICK M. SUMNER *vs.* WILLIAM H. WILLIAMS.

In an action on a promissory note payable in one year, "with nine per cent. interest," the forfeiture to be deducted, under the Rev. Sts. c. 35, § 2, is only three times the amount of nine per cent. for one year; that being threefold the amount of the whole interest reserved.

ASSUMPSIT on a promissory note, payable in one year from October 1st, 1836, with nine per cent. interest. The only question made at the trial, before *Dewey*, J. was as to the amount to be deducted as the forfeiture for reserving usurious interest. A verdict was taken, *pro forma*, for the balance, after deducting three times nine per cent. up to the day of the trial, and it was agreed that if, in the opinion of the court, the deduction should have been made on any different computation, the verdict should be amended accordingly.

Brooks, for the plaintiff.

Stevens, for the defendant.

SHAW, C. J. This is a somewhat remarkable instance of a note, in which the usury is expressed upon the face of it. It was argued that it was not usurious, because the contract for all over six per cent. was unlawful and void, and left the remainder of the contract valid. On the contrary, the statute declares

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that such contract shall not be thereby rendered void. Rev. Sts. c. 35, § 2. Besides, when by law an agreement for more than six per cent. was prohibited, it was not the less usurious because by law it was void. This contract is undoubtedly usurious; and the only question is, what shall be the amount of the forfeiture to be deducted. The provision of the statute is, that the plaintiff shall forfeit threefold the amount of the whole interest reserved or taken. The statutes have always made a marked distinction between interest "reserved," and interest "taken." The latter is applied only to interest actually received for the use or forbearance of money, either by way of discount paid in advance, or money paid whilst the loan is outstanding; or upon the final settlement. But interest "reserved," is that which is engaged or stipulated for in some form, by the terms of the contract. In ordinary cases, the premium is added to the sum actually lent, and then the stipulation for the payment of simple interest makes in fact a stipulation for usurious interest. But in the present case, all the interest reserved was nine per cent. on the sum actually lent, for one year. We think, therefore, that the forfeiture will be three times the amount of that nine per cent. for one year. In the cases of *Parker* v. *Biglow*, 14 Pick. 436, and *Brigham* v. *Marean*, 7 Pick. 40, where the interest, upon which the forfeiture was computed, was brought down to the time of the trial, the usurious interest was embodied in the contract, and so was "reserved" within the meaning of the statute; and this distinguishes them from the present case.

The verdict is to be amended conformably to the above mentioned mode of computing the forfeiture, and judgment is to be rendered thereon accordingly.

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Hannah Harris *vs.* William Harris & others.

A testator devised to his wife 'the Haynes place, with the Pierce lot, meaning to include all my real estate that lies west of the Shirley road, except what belongs to the Bennet place." The Bennet place and the Haynes place extended both sides of the road. The testator owned a lot, called the Page lot, the easterly side of which adjoined the westerly part of the Bennet place; but after he purchased the Bennet place, he removed the fence between that place and the Page lot, and occupied both in common for fifteen years next before his death. *Held*, that the Page lot did not pass to the wife, by the devise.

Writ of entry to recover a parcel of land in Lunenburg, called the Page lot. The case was submitted to the court on the following facts:

William Harris, by his last will, proved and allowed in November, 1839, devised land to his wife, the demandant, which he thus described, viz., "the Haynes place, so called, with the Pierce lot, so called; meaning to include all my real estate that lies west of the town road leading by my house to Shirley village, except what land belongs to the Bennet place, so called, on which I now live." He devised the rest of his real estate to his children, the tenants, to be equally divided among them.

The testator purchased the Bennet place, consisting of 130 acres, of James Bennet, in 1825, and resided thereon when he executed his will, and until his death. In 1824, he purchased the Page lot, containing about 12 acres. In 1803, he purchased the Haynes place, and, in 1830, the Pierce lot, containing about 14 acres. The three last mentioned parcels of land were separated from each other by fences, and were described, in the deeds of conveyance to the testator, by metes and bounds The Page lot and the Haynes place were described as bounding on land of said James Bennet.

About a year after the testator purchased the Page lot, viz., in 1825, he removed the fence between that lot and the Bennet place, and that lot was ever afterwards occupied by the testator in common with an adjoining pasture of the Bennet place.

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The Bennet place and the Haynes place extended on both sides of the Shirley road.

Tenants to be defaulted, if the Page lot passed to the demandant by the will; otherwise, the demandant to become nonsuit.

Washburn, for the demandant. Lands included in a general description, in a deed or devise, will pass, unless such description is plainly restricted by a particular description. *Tyler* v. *Hammond*, 11 Pick. 212. *Child* v. *Ficket*, 4 Greenl. 471. Hob. 172. 23 Amer. Jurist, 274, 275. Under this rule of construction, the demandant is entitled to the Page lot. The devise, in this case, is not first general, and then limited by a specific description. The testator began to describe what he intended to give to the demandant, and then indicated his intention by adding all his lands, except the Bennet place. If he merely meant to give the Pierce lot and so much of the Haynes place, as lay west of the road, he would have said so, and not have added any thing further.

Wood, for the tenants. General words in a deed or devise are to be restrained by the preceding special words of grant or gift. *Cole* v. *Knight*, 3 Mod. 277. *Butcher* v. *Butcher*, 1 New Rep. 113. *Thorpe* v. *Thorpe*, 1 Ld. Raym. 235. *Moore* v. *Magrath*, Cowp. 9. *Smith* v. *Strong*, 14 Pick. 128. *Tyler* v. *Hammond*, 11 Pick. 193. In the present case, the general words of the devise, "all my real estate," &c, are restrained by the preceding words confined to the Haynes place and Pierce lot.

If the court shall not find this rule of construction applicable to the case at bar, then the tenants submit that the Page lot is excluded from the devise to the demandant, by the exception of the Bennet place: That is, the Page lot was regarded by the testator as part of the Bennet place. *Carden* v. *Tuck*, Cro. Eliz. 89. *Boocher* v. *Samford*, Cro. Eliz. 113. *Higham* v. *Baker*, Cro. Eliz. 15. *Hearn* v. *Allen*, Cro. Car. 57. *Doe* v. *Collins*, 2 T. R. 498. *Blackborn* v. *Edgley*, 1 P. W. 603. *Otis* v. *Smith*, 9 Pick. 293.

Shaw, C. J. The question in this case is hardly intelligible

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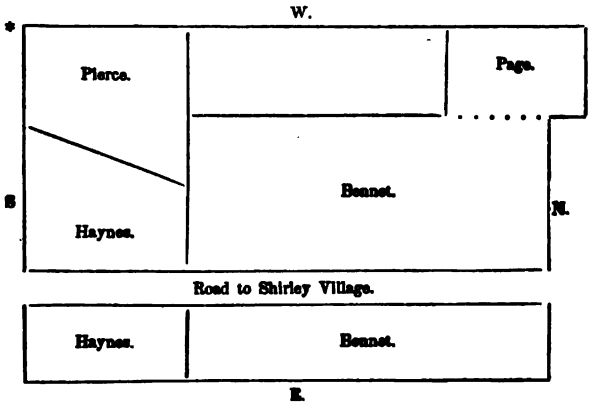
without reference to the plan.* That question is, what did the testator intend to devise to his wife, by the terms used in his will. All the rules of construction are designed to enable us to ascertain the intent of the testator; and that intent, ascertained by a just construction of every part of the will, and its application to the lands, to which the terms of locality and description must apply, will afford a governing rule for ascertaining the extent of the particular devise. The general rules of construction are too well known and familiar to require repetition; and the particular descriptions, in different cases, vary so materially, that the decision upon one set of descriptive words seldom furnishes an authority for any other case.

The question in the present case is, whether the devise to the wife embraced the Page lot. It is contended for the wife, that it did, because that lot, though not named, lay west of the road. But a part of the estate lying west of the road was excepted, and whether the lot in question is embraced in the devise or the exception, must be ascertained from considering the whole will, and the situation of the different lots.

It will be observed, that the testator owned lands on the east side of the Shirley road; that the Haynes place, and the Bennet place, as he purchased them, lay on both sides of that road. When therefore, he gave to his wife the Haynes place,



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so called, it became necessary to use some words, excepting that part of the Haynes place, which lay on the east side of the road. It will also be perceived that the Pierce lot, which was also given to the wife, adjoined the Haynes lot, west of the road. The Page lot, which is the one in question, did not adjoin either the Haynes lot, or the Pierce lot. But it did adjoin the Bennet lot; and it appears that the testator, soon after he purchased the Bennet lot, removed the fence, which separated that from the Page lot, which he before owned, and threw them together into one close, of which the Bennet lot constituted much the largest part, and that he ever after used them together as one pasture, to the time of his death. We think then, that when the testator gave the Haynes lot and the Pierce lot, specifically and by name, and then adding the words "meaning all west of the road, except," &c., he did not mean to enlarge the devise to the Page lot, but intended to prevent the gift of the Haynes place from including that portion thereof, lying east of the road. Again, the exception out of the real estate which lies west of the road is this, "except what land belongs to the Bennet place, so called." It is not land purchased of Bennet, but belonging to the Bennet place, so called. The testator had, by removing the fence, connected the Page lot with the Bennet lot, and used them as one enclosure. It may be considered, therefore, without doing violence to the language, as belonging to the Bennet place, as that term was understood and used by the testator. At least this appears much more probable, than that the testator, after devising two lots, by name, on the west side of the road, intended to give another detached lot on the west side of the road, under words which, in their primary object at least, were intended to qualify the devise of the Haynes place, by limiting it to that part of the Haynes place, which lay on the west side of the road. Upon the whole will, the court are of opinion that the devise did not embrace the Page lot, and that the demandant therefore is not entitled to recover.

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Leonard Harrington *vs.* Daniel Harrington, 2d, & another.

Under the Rev. Sts. *c.* 24, a town way may be legally laid out by selectmen, and accepted by the town, though the warrant for the town meeting at which such way is accepted is dated and issued before the way is laid out.

Selectmen laid out a town way over the land of A., and awarded him damages, to be paid by B. before the road should be opened. The town voted to accept the report of the selectmen, on condition that B. should "build the road and pay all expenses of the same, and defend the town against all prosecutions." The damages awarded to A. were tendered to him before his land was entered upon. *Held*, that the way was legally established, and therefore that A. could not maintain an action against those who entered upon his said land for the purpose of constructing the road.

Trespass for breaking and entering the plaintiff's close in Shrewsbury. The defendants pleaded the general issue, and, in defence, gave in evidence, on the trial before *Dewey*, J. that they went upon the plaintiff's land, at the time of the alleged trespass, for the purpose of constructing a town road, which had, before that time, been laid out by the selectmen, and accepted by the town. To support this defence, they introduced the records of the town, from which it appeared, that on the 25th of April, 1839, a warrant was issued for a town meeting to be held on the 13th of May following, and that one article in said warrant was, "to hear the report of the selectmen in an alteration of town road, No. 20, near the house of Daniel Harrington, 2d, easterly to the town road leading by Gershom Wheelock's house, and accept the same, if they see fit."

Before the issuing of said warrant, Daniel Harrington and others had petitioned the selectmen to lay out a town road between the points mentioned in said article. On the day after said warrant was issued, the selectmen gave notice to the plaintiff and other proprietors of lands over which said road was to pass, of the petition for the laying out of the road, and informed them that the 4th of May was appointed for laying it out, and that they would meet at the house of Daniel Harrington, 2d, at 6 o'clock, P. M., on that day. On said 4th of May, the

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selectmen laid out said road, and made report thereof to the town at the meeting held, pursuant to said warrant, on the 13th of May. In this report, the selectmen stated, (*inter alia*) that they had laid out the road over the plaintiff's land, and had appraised his damages at $12·50, "to be paid by Daniel Harrington, 2d," (one of the defendants,) "before said road is opened." The damages of the other owners of land, over which said road was laid out, were also ordered to be paid by said Harrington, "as aforesaid." This report was filed in the town clerk's office by the selectmen, seven days before said town meeting. The entry in the town records was, that at said meeting, "the foregoing report was read to the town, and it was therefore voted, that the same be accepted on the following conditions; to wit, that the said Daniel Harrington, 2d, shall build the said road, and pay all expenses of the same, and defend the town against all prosecutions; and that all the selectmen be a committee to oversee the building of said road."

At the meeting at which said report was accepted, and also in the evening following, one of the selectmen tendered to the plaintiff the damages awarded to him.

The acts, which constitute the alleged trespass, were done by direction and in presence of the chairman of the selectmen, in the construction of said road.

The selectmen, in March, 1839, laid out a road over the same land, and made their report in the same terms as in their subsequent report above stated. That report was accepted by the town; but as it was not filed in the clerk's office, according to law, the selectmen, for that reason, laid out the road anew, upon a new petition, as above mentioned.

The plaintiff insisted, that the foregoing facts did not constitute a defence; and the case was taken from the jury and reserved for the consideration of the whole court, under an agreement of the parties, that the defendants should be defaulted, or the plaintiff become nonsuit, as the court should order.

C. Allen, for the plaintiff. The proceedings of the selectmen in laying out the road were void, as they were after the warrant was issued for calling a meeting to accept these pro-

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ceedings. The warrant might well have been understood to refer to the former laying out of the road. *Kean* v. *Stetson*, 5 Pick. 492. *Howard* v. *Hutchinson*, 1 Fairf. 335. [See also 4 Shepley, 301.] The acceptance of the road, as laid out, was on conditions which the town had no authority to annex thereto, and was therefore void. But if those conditions were legal, yet they have not been performed.

Washburn, for the defendants. The case of *Kean* v. *Stetson* was under *St.* 1786, *c.* 67, which required no notice to a land-owner before laying out a town road over his land, and made no provision by which the inhabitants of the town could scertain what the selectmen had done, until they should assemble in town meeting. The evils and defects of this and other statutes are corrected by the Rev. Sts. *c.* 24. By § 69, it is required that the laying out shall be filed in the town clerk's office seven days before the *meeting*; not before issuing the *warrant* for the meeting. The statute has been complied with, n the present case, and all parties in interest have had the full benefit it was designed to afford them.

The objections, that the article in the warrant was not sufficiently explicit, and that the acceptance of the road by the town was conditional, are both answered by the case of *Jones* v. *Andover*, 9 Pick. 146. See also *Copeland* v. *Packard*, 16 Pick. 221.

As the defendants did the acts complained of under the authority of the town, trespass will not lie against them.

Shaw, C. J. In an action of trespass *quare clausum*, the defendants justify on the ground that a town way had been laid out over the close in question, by the selectmen of Shrewsbury, and ratified by a vote of the town, and that the defendants entered, under the direction of the selectmen, for the purpose of making the road. The plaintiff insists, that the proceedings of the selectmen and of the town were irregular, the laying out void, and that the defendants cannot justify under them.

The first exception is, that the warrant, for the meeting of the town to act upon the report of the selectmen, was dated and issued before the day on which the selectmen actually laid

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out the road. This is founded upon the authority of *Kean* v. *Stetson*, 5 Pick. 492. That case was decided upon the construction of an earlier statute, differing essentially from the provisions of the existing law. The great principle there decided is, that in laying out town ways and private ways, selectmen do not act as agents of the town, but as public functionaries vested with that power by law; and that the authority of the town is simply to ratify or disaffirm their doings. The selectmen, therefore, must take the first step; they must first proceed to lay out the way, and then call upon the town to act upon their report. By the law, as it then stood, no length of notice to persons interested was required to be given previous to the location, nor were the selectmen required to file the report of the location, any length of time before the town meeting, in any public place, to which the persons interested, and the voters of the town, might have access. But now, by the Rev. Sts. *c.* 24, §§ 67 – 69, both these defects are remedied. Notice is to be given to parties, over whose lands a road is proposed, seven days before the day fixed for the location; and the location, with the boundaries and admeasurements of the way, must be filed in the town-clerk's office, seven days before the meeting at which it is to be acted on. If, therefore, the meeting is duly notified and warned to act upon the doings of the selectmen in laying out the way, it is sufficient, although the way has not been actually laid out when the warrant is dated; because it must be laid out, and the report filed, seven days before the meeting; and unless it is, the warrant will be merely nugatory and inoperative.

The second exception is, that the vote of the town, affirming the act of the selectmen, was conditional; that the town had no authority to annex such conditions; and that this rendered the vote void.

Upon the mere question, whether the annexing of a condition to the vote of the town affirming and ratifying the act of the selectmen, renders the vote invalid and the act void, we think *Jones* v. *Andover*, 9 Pick. 146, is a decisive authority.

In the present case, all the conditions, except that of paying

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the damages for land, as part of the expenses, were in their nature conditions subsequent. The effect of a condition subsequent is not to prevent the act to which it is annexed from taking present effect; but it may defeat it afterwards, or be attended with other legal consequences. It is obvious, therefore, that the operation of such a vote was to give immediate effect to the act of the selectmen, and affirm the location of the way. If the condition was contrary to law, then the condition alone was void, and the vote would stand as if it were absolute and unconditional.

But the condition might have some effect. It may be that Daniel Harrington, 2d, had entered into some agreement to charge himself, or his heirs, or the estate which he held, (an agreement not now considered contrary to public policy,) and that the annexation of the condition was to recognize and accede to that agreement. This was matter between said Harrington and the town, and, we think, did not render void the act and vote of the town, affirming the location made by the selectmen, and establishing the way.

The third exception is, that the conditions were not complied with. We have already stated, that all the conditions were subsequent, and therefore previous compliance with them was not necessary to give effect to the vote, except the payment of damages for land taken; if, indeed, that is to be considered an exception. It appears by the facts in the present case, that the damages were repeatedly tendered to the party through whose land the road was laid, before the land was entered upon, and that he refused to accept the money. When a duty is to be performed, a condition or forfeiture saved, or a right established, by the payment of money, tender of the money is sufficient. It is not in the power of him who is to pay, to compel the other to receive the money. All he can do is to make a formal and legal tender; and in doing this, rights are saved, whether the other will accept or not.

We think, therefore, that none of the exceptions are well founded.

It was contended for the defendants, that even if there were

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irregularities in the proceedings, they could not be taken advantage of in this way, collaterally, and that there being a way *de facto*, the persons employed by the town to make it could not be proceeded against as trespassers. This question we have had no occasion to consider, and we give no opinion upon it.

Plaintiff nonsuit.

EDMUND CARPENTER *vs.* EZEKIEL WOOD.

A submission was made to the arbitration of three persons, with an agreement that their award, or the award of a majority of them, should be final: All the arbitrators met and heard the parties, but after consulting together at different times, and not agreeing on an award, one of them told the others that he should not sit with them again: The two others afterwards met and made an award, without requesting the attendance of the third, or giving him notice. *Held* that the award was valid.

COVENANT BROKEN. The alleged breach of covenant was, that the defendant had neglected and refused to perform an award of arbitrators. The defence was, that no valid award had been made. At the trial, the presiding judge, after all the evidence was introduced, proposed to reserve the question, whether the award was valid, for the consideration of the whole court. A nonsuit was thereupon entered, which was to be confirmed or set aside, as that question should be decided.

The instrument of submission was under seal, dated May 26th, 1838; and the terms thereof and the proceedings of the arbitrators under it, so far as they affected the decision of the cause, are stated in the opinion of the court.

Washburn, for the plaintiff.

C. Allen, for the defendant.

PUTNAM, J. This is an action to recover for the amount of an award. The plaintiff having granted to the defendant a right to flow his land, and also to dig a trench through it, submitted, with the defendant, the amount which the defendant should pay for the said grant, to Aaron A. Wallis, Samuel Balcom, and Amos Fairbanks, the award of whom, or the majority of whom, upon the subject matter of damages and costs, to

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be final and conclusive; provided they should give reasonable notice to the respective parties of the time and place of meeting: And if either of the referees should decease, the remaining two should choose another in his stead, immediately: If two should decease, the survivor should immediately choose one other, and they two should choose a third, whose award should be alike final. And the parties agreed, that the referees should meet to award upon the damages done under the defendant's mill-dam, as it then was, on the first week in July then next; and might be called by either party: And if either party should revoke the submission, he should forfeit and pay to the other $500; and if the defendant should revoke, then the plaintiff's said grant was to become void, and he was to have his damages as the law provides.

It is proved that all the referees met and heard the parties, on the 6th of July, 1838, and adjourned to the next day, when the hearing closed. All the referees then took the matter submitted to them into their consideration, and, after deliberating upon the same for some time, separated without coming to any agreement. And they all met again, in three or four weeks, and they then differed more in their opinions than they did at their first meeting. The referees all met again in November, and concluded not to make any award then. One of them, (Wallis,) then said he should do no more, with the other referees, about it; and that *he should not sit with them any more*, because they could not agree upon the award which should be made. Accordingly, the other two referees, on the 18th of February, 1839, made the award, which is now in question, in the absence of Wallis, who had no notice to meet them on that day; and the award, thus made, was then delivered to the plaintiff, both parties being then present.

It is also proved that the award was made up from the hearing before all the referees in July, and that no new hearing of the parties was afterwards had before either of the referees And the question is, was that award valid.

It is not suggested that Wallis, the chairman, was prevented, by any fraud, from meeting and consulting with the other refer-

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ees, so long as he chose to consider himself as acting under the commission. If he voluntarily withdrew, after the hearing and consultation before the three, it is not contended by the defendant, but that the majority of the arbitrators might proceed to make their award against his consent. The case of *Dalling* v. *Matchett*, Willes, 215, goes much further than is contended for the plaintiff in the case at bar. In that case, the submission was to three arbitrators, "so that they, or any two of them," might make an award. One of them did not attend, though he might have attended if he would, and the award was made by the two others. It was agreed by *both sides*, that if the third had met and heard the parties with the other two, the majority might have made a valid award. But it was held, that where the third had had sufficient notice of the meeting of the arbitrators, (as was admitted or proved to have been given in that case,) but would not attend, the two others had authority to meet, hear, and award. "If," said the court, "either by obstinacy, or at the desire of the defendant, or being hindered by business, the third arbitrator absented himself from the meetings, having had due notice thereof, we are of opinion that the award is good. Otherwise it would be in the power of one of the parties to trick the other, and entirely to defeat him of the benefit of the reference." *S. C.* Barnes, (3d. ed.) 57. The latter remark would apply more strongly, where one of the referees should withdraw after the hearing before all of them.

So, according to *Sallowes* v. *Girling*, Yelv. 203, (*S. C.* Cro. Jac. 277. 1 Brownl. 112.) on a submission to four, by bond, on condition to stand to the award of them or of any two of them, any two may arbitrate and award.

It is, however, well settled here, that in case of a submission, under *St.* 1786, *c.* 21, to three, "the report of whom, or of any two of whom, to be made," &c., all must *hear* the parties, but that a majority of the referees may make a valid report, against the consent of the third. *Short* v. *Pratt*, 6 Mass. 496. *Walker* v. *Melcher*, 14 Mass. 148. See also *M^c Inroy* v. *Benedict*, 11 Johns. 402. And so is the civil law. Where there is a submission to three, an award of two is not valid, if the

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third did not attend; for the reason, that if he had attended he might have drawn his brethren to a different opinion. Kyd on Awards, 105, 106.

Now in the case at bar, Wallis, the chairman, did attend with his brethren, and they all heard the parties. It would not be competent for either party afterwards to annul the submission, against the will of the other; nor would it be in the power of one of the abitrators to avoid the agreement of submission, by withdrawing from the trust. *Haskell* v. *Whitney*, 12 Mass. 49. *Milne* v. *Gratrix*, 7 East, 608.

But the counsel for the defendant contends that the chairman, under the facts stated, cannot be said to have withdrawn, or so to have withdrawn, as to have rendered it lawful for his brethren to make the award, against his consent, and without any notice to him when they made it.

At the first meeting, it appeared, upon the consultation after the hearing, that the referees could not agree. At a subsequent meeting, when all the referees were present, they concluded that they could not make a report *then*; and then it was that the chairman said he should do no more with the other referees about it, and he should not sit with them any more: And afterwards, to wit in September, he so informed the defendant. The award was afterwards made, in February, by the majority, but without any new hearing of the parties, and without calling upon or giving notice to the chairman, that the majority of the referees were about proceeding to make their award. And it seems to us, that any such notice would have been a work of supererogation, if not of impertinence. What reason had the two referees to suppose that the third had altered his mind? He had already told the two, that he would not sit with them again. He was not willing to award so much to the plaintiff as the others were. They had conferred together once and again, and the more they conversed, the more they disagreed; and such was their position when the chairman told the other referees that he would do no more about it with them.

No particular form of words is necessary to constitute a refusal to act, or a withdrawing from any further participation in

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a trust of this nature. In *Kingston* v. *Kincaid*, 1 Wash. C. C. 448, it appeared, on examination of the referees, that the three often met upon the subject, but as one could not agree with the others, on important points of dispute, he said it was unnecessary to call upon him again, and he withdrew; and the award of the majority, without any further notice to the third referee, was not held objectionable on that account. 1 U. S. Digest, Arbitrament, &c. 246. In *Cumberland* v. *North Yarmouth*, 4 Greenl. 468, *Mellen*, C. J. said, "if after a joint hearing of the parties and their proofs, in the first instance, and before a recommitment, one of the referees absent himself immediately, or refuse to consult with his brethren, or to give any opinion, then the other two have full power to decide the cause upon the evidence previously produced, and heard by all." And so in *Kunckle* v. *Kunckle*, 1 Dall. 364, an award signed by two of the three referees, without notice to the third, was sustained, where they agreed upon the substance of their report in the presence of the third referee, who declared his disagreement, and said the others could make the report without him. Having said that, it became unnecessary for the two to give him any further notice, before they made and signed the report.

On the whole, from the reasons as well as from the authorities before mentioned, we are of opinion that the nonsuit should be set aside, and judgment be rendered for the plaintiff, according to the award.

Ezra Goddard *vs.* John Divoll.

An administrator suffered judgment to be rendered against himself, in an action brought for his own benefit in the name of another, and, in the levy of the execution upon the intestate's estate, acted both as defendant and as agent of the nominal plaintiff. *Held*, that the proceedings were unwarrantable and collusive, and that such levy was void as against another creditor of the intestate who made a regular levy on the same estate.

This was a real action for the recovery of land in Holden. The demandant claimed title under a levy of an execution is-

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sued on a judgment recovered by him against Francis Thaxter, administrator of the estate of Samuel Whitney. The action, in which said judgment was recovered, was commenced against said Whitney on the 26th of June, 1830, and the demanded premises were attached on that day. Said Whitney died in 1834, pending said action. On the 17th of November, 1835, said Thaxter was appointed administrator of his estate, and, at the following December term of the court of common pleas, became party to said action and suffered judgment to be rendered against himself, as such administrator.

Before said action was commenced against Whitney, said Thaxter became interested in the claim which the action was brought to enforce, and the action was commenced and prosecuted for his benefit, in the name of Goddard, the demandant, who had no interest in the judgment that was recovered, but the same, by agreement between him and Thaxter, was to enure to the sole benefit of the latter.

When the execution was levied on the demanded premises, the demandant was not present, but Thaxter acted as his agent, appointed an appraiser for him, and also an appraiser for himself, showed the premises to the appraisers, received possession thereof from the officer, and paid him the fees of the levy.

The tenant claimed title to the demanded premises, under a levy of an execution on the 6th of April, 1832, in the lifetime of said Whitney. But the attachment on the tenant's original writ was not made until after the demandant's attachment; viz. on the 7th of November, 1830.

On these facts appearing at the trial, before *Dewey*, J. he advised a nonsuit, on the ground that Thaxter, being the sole person interested as creditor in the said judgment recovered by Goddard, could not, as administrator of the original defendant, appear and authorize a judgment to be rendered against the estate of Whitney in his hands, and levy execution on the land in question, and thus defeat the tenant's levy. The demandant thereupon became nonsuit, subject to the opinion of the whole court.

C. Allen, for the demandant.

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Bigelow and *Washburn*, for the tenant, cited 1 Story on Eq. 316–318. Story on Agency, 11, 199.

PUTNAM, J. The attachment, on which the demandant relies, was made June 26th, 1830, before the attachment which was made by the tenant. Both parties claim the demanded premises as the estate of Samuel Whitney; so that the demandant should prevail, if the proceedings, under his attachment and process against Whitney's estate, were legal.

The case finds, in effect, that Thaxter was the owner of the judgment recovered by Goddard, against the estate of Whitney in the hands of Thaxter as administrator; that Thaxter prosecuted the suit against himself, in Goddard's name — thus representing the estate of Whitney, which was the debtor, and also representing Goddard, who was the creditor of record. In the levy of the execution also, Thaxter represented both parties. The suit was, to all intents, the suit of Thaxter against himself, though it was carried on in the name of Goddard. As administrator, Thaxter submitted to a judgment against the estate, in just the amount, which he, as actual creditor, and as agent of the nominal creditor, desired. Then came the farce of a levy; Thaxter appointing two appraisers, one as administrator, another as representative of Goddard, the nominal plaintiff. The estate of Whitney was thus formally set off to Goddard, to enure to Thaxter, and these proceedings are now put forth to defeat the regular adverse levy of the tenant's execution on the same estate. A mere statement of the facts is sufficient to show that the demandant's claim cannot be supported. His judgment, and the proceedings thereon, were collusive and unwarrantable. The nonsuit was properly advised, and must be confirmed.

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Royal Thayer *vs.* William Crossman.

In an action by the indorsee against the maker of a promissory note which was indorsed after it was due and dishonored, the indorser is a competent witness to prove that the note was paid before it was indorsed.

Assumpsit by the indorsee of a promissory note dated November 30th, 1832, given by the defendant to Reuben Waters, Jr. payable to him, or order, on demand.

At the trial, in the court of common pleas, before *Warren*, J. the plaintiff proved that Waters indorsed the note to him, on the 27th of June, 1834. The defendant then offered to prove, by the testimony of Waters, that the defendant paid the note to him before he transferred it to the plaintiff. The judge rejected the testimony, and a verdict was returned for the plaintiff. Whereupon the defendant filed exceptions.

Thomas, for the defendant. The doctrine, that an indorser of a note shall not be permitted to disparage it, has been overruled. *Birt* v. *Kershaw*, 2 East, 458. *Jordaine* v. *Lashbrooke*, 7 T. R. 601. *Stafford* v. *Rice*, 5 Cow. 23. *Williams* v. *Walbridge*, 3 Wend. 415. *Townsend* v. *Bush*, 1 Connect. 260. *Baird* v. *Cochran*, 4 S. & R. 397.

If the decision in *Churchill* v. *Suter*, 4 Mass. 156, which will be relied on by the plaintiff, is not to be overruled, yet it will not be extended. The rule adopted in that case applies only to usurious and gaming notes, &c., which are void in their inception; and the other cases in this court, in which the rule has been applied, are, with one exception, cases of usury. *Parker* v. *Lovejoy*, 3 Mass. 565. *Jones* v. *Coolidge*, 7 Mass. 199. *Hartford Bank* v. *Barry*, 17 Mass. 94. *Packard* v. *Richardson*, 17 Mass. 122. *Widgery* v. *Monroe*, 6 Mass. 449. The case of *Butler* v. *Damon*, 15 Mass. 223, was not one of usury; but the incompetency of the witness was not the true ground of decision in that case. The defence which was offered, could not have been legally made by any proof. So of *Knights* v. *Putnam*, 3 Pick. 184.

As to matters of defence, which arise after the execution of

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a note, a party thereto is a competent witness. *Warren* v *Merry*, 3 Mass. 27. *Parker* v. *Hanson*, 7 Mass. 470. [*Bryant* v. *Ritterbush*, 2 N. Hamp. 212. *Adams* v. *Carver*, 6 Greenl. 390. *Nichols* v. *Artman*, Harper, 285.]

The reason of the rule adopted in *Churchill* v. *Suter*, viz., that it would tend to repress the circulation of negotiable paper, if a party thereto might be permitted by his testimony to destroy it, is not applicable to the case at bar, in which the note was indorsed long after it was due. *Spring* v. *Lovett*, 11 Pick. 419. *Furman* v. *Haskin*, 2 Caines, 372. *Ayer* v. *Hutchins*, 4 Mass. 370.

C. Allen, for the plaintiff. The doctrine in *Churchill* v. *Suter* has never been denied by this court. Nor has it been confined to cases where the note was originally void. *Butler* v. *Damon*, 15 Mass. 223. *Knights* v. *Putnam*, 3 Pick. 184.

Shaw, C. J. This case comes before the court by exceptions from the court of common pleas. The action is on a promissory note, by an indorsee against the promisor, the note being dated November, 1832, payable on demand to the promisee or his order, and indorsed to the plaintiff. The defendant offered the indorser as a witness, to prove payment of the note before the indorsement; but the presiding judge at the trial rejected this testimony. The ground of this rejection was, as we understand by the argument, the rule laid down in *Churchill* v. *Suter*, 4 Mass. 156, that an indorser shall not be permitted by his testimony to invalidate a security, which he has put in circulation, and given credit to by his indorsement.

We do not think it necessary now to consider at large the authority of the rule in question, as a rule of law in this State. It was first formally laid down, in the time of Lord *Mansfield*, in the case of *Walton* v. *Shelley*, 1 T. R. 296. It was afterwards overruled in the same court, the court of King's Bench, in the time of Lord *Kenyon*, by three judges against one; Mr. Justice *Ashhurst*, who had concurred in the former opinion, dissenting. *Jordaine* v. *Lashbrooke*, 7 T. R. 601. Both these cases were before the court, when the rule was sanctioned in this Commonwealth. *Warren* v. *Merry*, 3 Mass. 27. *Churchill*

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v. *Suter*, 4 Mass. 156. It continued to be acted on, as a settled rule here, and was again considered and confirmed, in the case of *Packard* v. *Richardson*, 17 Mass. 122. It was adopted in 1802, by a majority of three to two, in the supreme court of New York; *Radcliff* and *Kent*, Js. dissenting. *Winton* v. *Saidler*, 3 Johns. Cas. 185. But it was afterwards overruled, and has ceased to be regarded as a rule of law in that State. *Stafford* v. *Rice*, 5 Cow. 23. *Williams* v. *Walbridge*, 3 Wend. 415. In Connecticut, the rule has been rejected by a formal decision in 1818. *Townsend* v. *Bush*, 1 Connect. 260.*

But supposing the rule settled for this Commonwealth, by a course of decisions too direct and uniform to be now drawn in question, still it becomes necessary to examine the rule itself, to ascertain its extent, limits, and qualifications, in order to determine whether the present case is within it. The general rule is, that any person, not infamous, or interested in the event of the cause, may be a witness; and it is manifest that the rule in question, which excludes a witness on the grounds of public policy, is an exception to the general rule; and an exception ought not to be extended beyond the limits, to which those reasons of policy fairly carry it.

In *Walton* v. *Shelley*, the rule laid down, as the rule founded on public policy, was, that no party who has signed a paper

* It has also been rejected in Vermont, *Nichols* v. *Holgate*, 2 Aik. 140 (but see 2 Verm. 197-199;) in New Jersey, *Freeman* v. *Brittin*, 2 Harrison 192; in Maryland, *Ringgold* v. *Tyson*, 3 Har. & Johns. 172; *Hunt* v. *Edwards*, 4 Har. & Johns. 283; in Virginia, *Taylor* v. *Beck*, 3 Rand. 316; in Kentucky, *Gorham* v. *Carrol*, 3 Litt. 221; in North Carolina, *Guy* v. *Hall*, 3 Murph. 151; in South Carolina, *Knight* v *Packard*, 3 McCord, 71; in Georgia, *Slack* v. *Moss*, Dudley, 161; in Alabama, *Todd* v. *Stafford*, 1 Stew. 199; *Griffing* v. *Harris*, 9 Porter, 226; and in Tennessee. *Stump* v. *Napier*, 2 Yerg 35.

But the rule has been adopted in Maine, *Deering* v *Sawtel*, 4 Greenl 191; *Chandler* v. *Morton*, 5 Greenl 374; in New Hampshire, *Houghton* v. *Page*, 1 N. Hamp. 60; in Pennsylvania, *Griffith* v. *Reford*, 1 Rawle, 196; *Harrisburg Bank* v. *Forster*, 8 Watts, 309; and by the Supreme Court of the United States. *Bank of the United States* v. *Dunn*, 6 Pet. 51. *Bank of the Metropolis* v. *Jones* 8 Pet. 12.

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or deed, shall ever be permitted to give testimony to invalidate the instrument. Very shortly after, in the case of *Bent* v. *Baker*, 3 T. R. 27, some of the judges, in alluding to *Walton* v. *Shelley*, take care to confine the rule to the case of negotiable instruments, upon the ground, that a man shall not by putting in circulation a negotiable instrument, which any man may take and make himself a holder of, and which passes solely upon the credit of the names of the parties appearing upon it, hold out false colors to the public. And almost the entire argument of Mr. Justice *Ashhurst*, in *Jordaine* v. *Lashbrooke*, in support of the rule of *Walton* v. *Shelley*, was founded upon the policy of giving security to negotiable instruments, put into circulation in the course of business.

In *Warren* v. *Merry*, 3 Mass. 27, the rule and the reasoning are confined to the case of negotiable securities, and this rule is expressly so limited by a decision in *Loker* v. *Haynes*, 11 Mass. 498. In *Churchill* v. *Suter*, 4 Mass. 156, after considering the authorities, and considering them as leaving the point unsettled, the court proceed to consider the case on principle. They confine the rule to the case of negotiable securities; and the whole course of the reasoning further limits this rule to securities negotiated in the course of business, and which are not dishonored. The court recognize the general rule, that in order to give security to the circulation of negotiable paper, in an action between indorser and promisor, the consideration cannot be inquired into. An exception to this rule arises from the statutes of usury and gaming, which declare securities, given on a gaming or usurious consideration, absolutely void; and such defence therefore may be taken advantage of by a promisor, in a suit by an indorsee. And therefore the rule of policy is mainly confined to the case of a defence on the ground of a gaming or usurious consideration, which by force of the statutes in question affects these securities with a secret taint, which cannot be known to an indorsee.

In the case of *Fox* v. *Whitney*, 16 Mass. 118, the rule is still further limited and explained, by the considerations of public policy on which it was founded. The general rule is recog

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nized, but it is held to apply only to a case where a man indorses a negotiable security, and by that act gives a currency and credit to it; and it was held that it did not apply to a case between original parties, each of whom was conusant of all the facts. The suit, in that case, being by the representative of the promisee against the representative of the promisor; a party to the note, as co-promisor, was held to be a competent witness, to prove the note given on a usurious consideration, and, as the law then stood, void.

In the case of *Barker* v. *Prentiss*, 6 Mass. 430, Taber, one of the indorsers, was admitted to prove that the indorsement was intended to be limited, and that the indorsee knew it. The reasoning of the court obviously confines the rule in *Churchill* v. *Suter*, so as to prohibit a party to a usurious or gaming negotiable security, which is void in the hands of an innocent purchaser, from impeaching it, in the hands of such purchaser. And they held that a party to such security may be a witness to prove subsequent facts, which admit the legality of the instrument in its original form. The authority of this case, on other points, has been often called in question; but I am aware of no case, in which the point now stated, has been doubted.

Taking this case as thus stated, it would seem that a party is restrained from testifying only as to facts which render the security void in its creation, and that consistently with the rule, an indorser, if not interested, might be called to prove payment before he indorsed the note, being a fact subsequent to its creation and not rendering it originally void. This is opposed, apparently, to what is implied at least, if not decided, in *Warren* v. *Merry*, 3 Mass. 27. That was an action by an indorsee against the indorser, and the maker was held admissible to prove that he paid the plaintiff after the indorsement, and before the note was payable. But the remarks of the court seem to imply that a payee would not be admitted to prove payment to himself before his indorsement. It may, however, be remarked, that if a note is paid before it is due, and is afterwards indorsed, before it is due, to one who has no notice of the payment, such payment is no defence to a suit by the indorsee against the promisor.

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A similar principle seems to have been adopted in *Parker* v. *Hanson*, 7 Mass. 470, where an indorser was called to prove that a note had been fraudulently altered in the date. The court say he is not within the rule; the note not being objected to as originally void, but as having been fraudulently altered.

Perhaps the case of *Knights* v. *Putnam*, 3 Pick. 184, may be considered as countenancing the rule, that a note indorsed in the ordinary course of business cannot be impeached, by the testimony of the indorser, for any cause existing at the time of the indorsement. This question will therefore deserve consideration, when it shall expressly arise for adjudication.

In a review of the cases, that of *Butler* v. *Damon*, 15 Mass. 223, deserves consideration. It implies that the principle of *Churchill* v. *Suter* would so apply, as to exclude a party who had indorsed a note after it was due, as well as one who had indorsed it before it was due, from showing facts antecedent to the transfer, to defeat a holder of his recovery. The opinion does not state this; but it may be implied from the fact, which appears by a comparison of the dates, that in that case the note was overdue, when indorsed. But it is manifest from the very brief report of that case, that the attention of the court was not drawn to that distinction; nor does the remark of the judge, who gave the opinion, refer to it. But what is a more material observation upon that case as an authority is this; that the indorser had not been offered as a witness, but the defendant had been allowed to give in evidence, not the testimony, but the declarations of the indorser, made, after the indorsement, to the plaintiff. This was obviously inadmissible. It could not be received as an admission, because made after his interest had ceased, and he could not confess away a title he had given by his indorsement; nor as proof of any fact, because it was hearsay. The point, whether the indorser could have been received as a witness, having indorsed the note after it was due and dishonored, was not before the court, and the cause was decided on other grounds. As an authority, therefore, that case has but a slight bearing upon the present.

From this view of the authorities, and assuming that the rule,

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as laid down in *Churchill* v. *Suter*, is the true rule of law in this Commonwealth, we think it will appear to be confined to negotiable bills and notes, actually indorsed and put into circulation by the witness, with a view to give them currency as negotiable securities. The object, which the law has in view, is to give a secure currency and circulation to negotiable securities, taken in the ordinary course of business by an innocent indorsee, without notice of its dishonor. But it is no object of the law, or of public policy, to give currency to dishonored bills; and a note overdue carries notice of its own dishonor on its face. An indorsee of such a note is presumed by law to have notice of every defect which may exist, either in the original creation of the note or subsequently; he takes it, therefore, not upon the credit of the names it bears, but solely upon the faith he may have in the indorser. He takes, in legal contemplation, a legal title, indeed; that is, a right to sue in his own name; but he takes a right to recover only as the indorser himself could recover, and of course he takes with full constructive notice of all grounds, legal and equitable, which the defendant might have, if the suit were brought by the promisee, and subject to all the same species of defence. As between the original parties, and to a note not negotiated and put in circulation, we have seen the rule does not apply. *Fox* v. *Whitney*, 16 Mass. 118. By the rules of law, an indorsee, taking a note overdue, takes it subject to every defence; and that case, therefore, is an authority for the admission of an indorser, when the plaintiff can claim only the same rights as if the suit were between the original parties. The authorities are so numerous and explicit, that the indorsee of a dishonored note takes it subject to all defences, that it is unnecessary to cite them. *Sargent* v. *Southgate*, 5 Pick. 312.

In applying these rules to the present case, the court are of opinion that the case was not within the principle of *Churchill* v. *Suter*, because the note was overdue and dishonored, when it was indorsed to the plaintiff.

In the first place, it appears that this was a note payable on demand, and the evidence is, that it was indorsed nearly two years after its date. What is the shortest time, within which a

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note on demand will be deemed a dishonored note, has not been explicitly settled. But we have no hesitation in considering such a note as overdue and dishonored in a much shorter time than two years.

In *Spring* v. *Lovett*, 11 Pick. 417, it was considered that an indorser would be a competent witness to prove that the note was indorsed after it was due. But there is no necessity of relying on this point, in the present case, because it appears by other evidence, independent of the testimony of the indorser. Before coming to the question, therefore, whether the indorser in this case was a competent witness, it is proved by unobjectionable evidence, that the plaintiff took the note by indorsement, as a dishonored note. In Pennsylvania, where, it is believed, the rule of *Walton* v. *Shelley* is still in force as a rule of evidence, it is held that it only applies to a negotiable security, indorsed and put into circulation in the usual course of business, and that it does not apply to a note overdue, or otherwise dishonored. *Baird* v. *Cochran*, 4 S. & R. 397. This appears to us to be a just limitation and modification of the rule relied upon, and supported as well by authorities, as upon the reasons and principles of public policy, on which the rule itself is founded. The court are therefore of opinion, that Waters, the indorser, ought to have been admitted as a witness, to prove payment of the note before its indorsement; and because he was not so admitted, the exceptions must be sustained, and a new trial had.

New trial to be had at the bar of the court of common pleas.

MERRILL E. MACK *vs.* LYSANDER C. CLARK & others.

It is no defence to an action by an indorsee against the maker of a note, that the note was obtained by the payee, under an agreement with his creditors, to which the maker was not privy, that it should be indorsed and delivered to them, and that it was passed to the indorsee in violation of such agreement. It is immaterial, in such case, whether the indorsee received the note before or after it fell due.

ASSUMPSIT by the indorsee against the makers of a promissory note for $447·47, made payable to Thomas Grout, or order, in one year from August 19th, 1837.

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The case was submitted to the court upon the following report of the evidence given at the trial: The firm of Bailey Poor, & Richardson, on the 20th of June, 1837, commenced an action against the firm of Grout (payee of the note in suit) & Davenport, and caused said Grout to be arrested and held to bail; the property of Grout & Davenport having been previously attached at the suits of their other creditors. Grout afterwards informed the attorney of Bailey & Co. that he had made an arrangement with the attaching creditors to discharge their claims on receiving 75 per cent. thereon; and that he had also agreed with Bailey & Co. to receive the same proportion of their claim, on Davenport's continuing liable for the remaining 25 per cent. Grout also informed said attorney that Lysander C. Clark, one of the defendants, was to take the goods of Grout & Davenport, and give his note, with the other defendants as sureties, for the reduced amount to be paid to the creditors. Bailey & Co. also informed their said attorney that they had agreed to receive 75 per cent., and gave him the names of those who were to be sureties on said note. Davenport agreed to pay to Bailey & Co. the remaining 25 per cent.

Grout informed said attorney that the note of the defendants had been made, and requested him to discharge the bail in the suit of Bailey & Co., as he could not obtain possession of said note until certain property should be given up, which had been pledged to the bail, and which, by the agreement between Grout and Lysander C. Clark, was to belong to the latter. Said attorney thereupon caused the bail to be discharged; and said action of Bailey & Co. was stopped. The amount of the demand of Bailey & Co. against Grout & Davenport was $597·36, 75 per cent. thereof being $447·02.

The attorney of Bailey & Co. testified that he never saw Grout after his bail were discharged, but he supposed that the note which Bailey &. Co. were to receive had been delivered to them that the bail were discharged on the ground that said note was to be given to Bailey & Co. and delivered to them upon the discharge, if it had not already been received by them;

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and that the bail would not otherwise have been discharged. He also testified that Davenport had not paid the 25 per cent. as he had agreed to do, and that it was not a condition in the agreement between Grout and Bailey & Co. that Davenport should pay it.

Another witness testified, that in the autumn of 1837, Grout was for some time at Templeton, (where the witness resided) and afterwards left that place for one of the Western States, and that he had not seen him since; that on the day when Grout left Templeton, he delivered the note in question to the witness, taking from him a receipt to account for it; that when the witness first saw the note, it was then indorsed, "without recourse to me: Thomas Grout"; that Grout wished the witness, with the proceeds of the note, to settle with Bailey, Poor, & Richardson, for 25 per cent. of their debt, if he could, and said he wanted the residue to pay his brothers; that the note remained in the hands of the witness until the spring of 1839, when the plaintiff called on him with an order for it from Grout, and he thereupon delivered it to the plaintiff.

The witness further testified that he informed Lysander C. Clark where the note was, and demanded payment of him, after it became due, to wit in December, 1838.

Nonsuit or default to be entered, according to the opinion of the court, on the foregoing report.

C. Allen, for the defendants.

Thomas, for the plaintiff.

Shaw, C. J. The plaintiff shows a *primâ facie* title to the note, by proving the signature, indorsement, and delivery to him. The action is defended in behalf of Bailey, Poor, & Richardson, former creditors of Grout & Davenport. The evidence tends strongly to show that the note in question was made under an agreement between Grout and the creditors of his firm, that it should be indorsed and delivered to them, upon a compromise, and that, as between Grout and them, there was a good consideration in the relinquishment of other security. But the defendants were not privy to that agreement. On the contrary, they undertook to pay Grout or his order, in one year,

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without any limitation. It was no doubt contemplated, by the parties to the arrangement, that when Grout obtained the note he would indorse it and deliver it to Bailey & Co.; and it may be that it was a violation of his agreement, and the trust reposed in him, not to do it. Still, until that act was done, Bailey & Co. acquired no interest in the note as a legal security; nor did the defendants come under any legal obligation to them. But the plaintiff, having acquired a legal title, and the defendants having no ground to resist it, it is immaterial whether the plaintiff took the note before or after it fell due.

Defendants defaulted.

SAMUEL M. BURNSIDE *vs.* REJOICE NEWTON.

The direction in the Rev. Sts. *c.* 146, § 5, that proceedings, in suits pending when the former statutes were repealed, shall be conformed to the provisions of the Rev. Sts. extends to the case of *scire facias* against trustees.

On a *scire facias* against a trustee who was charged, by consent, on his answer in the original suit, he may make such additional answers, even respecting facts which existed at the time of the first answer, as may be necessary or proper for his defence. But where a trustee came in with such new answer, at a late period, and after costs had accumulated, it was received only upon terms, viz. that he should pay the costs of the *scire facias*, and take no costs thereon as the ultimately prevailing party.

SCIRE FACIAS. The defendant, on the 1st of March, 1836, was summoned as trustee, in a suit commenced by the plaintiff against D. T. Brigham. At the June term, 1836, of the court of common pleas, the defendant made his answer in said suit, and at the succeeding August term of said court, he was ordered to be discharged. From this order the plaintiff appealed, and brought the original action into this court, at the October term, 1836; and at the April term, 1837, the defendant was defaulted, and, as appeared by the record, was "charged by consent." Said Brigham was also defaulted, and execution issued against him and the defendant. It appeared, by the return of this execution, that demand was duly made on the defendant, and that he refused to expose any property of said Brigham, or otherwise to satisfy the execution.

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The present suit was commenced at the April term, 1838, of this court, when the defendant was permitted to make another answer, subject to the opinion of the whole court. At the October term, 1838, the defendant, made a further answer. At the present term, a still further answer was offered by the defendant, setting forth facts which existed at the time of the original answer.

C. Allen, for the plaintiff, argued that the second and third answers of the defendant, on the *scire facias*, could not be received; as the revised statutes were meant to extend only to the case of new facts that arise after a former answer.

Newton, pro se.

Shaw, C. J. Though the trustee attachment, in this case, was commenced before the revised statutes went into operation, yet by *c.* 146, § 5, future proceedings in suits pending were to be conformed to the provisions of those statutes. This has been held to apply to the case of *scire facias* against trustees. 21 Pick. 113, 114.

By the Rev. Sts. *c.* 109, § 41, trustees may be permitted to give new answers on the *scire facias*, and may show any matter necessary for their discharge. But when a trustee comes in at a late period to answer new matter, and puts his title to a discharge on new grounds, after costs have accumulated, the error or mistake, in not making the true answer sooner, must be deemed to be attributable to him; and his answer must be received on terms.

In the present case, the answer may be received on the defendant's paying the plaintiff the costs of the *scire facias*, and taking no costs of the same, to the present time, as the ultimately prevailing party.

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Commonwealth *vs.* Lebbeus J. Peck.

On the trial of an indictment for forgery, the party, whose signature is alleged to be forged, is a competent witness to prove the forgery and also the destruction of the instrument alleged to be forged, although civil actions are pending against him to which his only defence may be the forgery of said instrument.

Under the Rev. Sts. c. 138, §§ 11 - 14, this court has authority, in criminal cases brought here from the court of common pleas and municipal court upon exceptions, to grant a new trial, for other sufficient cause shown, after overruling the exceptions; or to remand the cause to the court of common pleas, &c., for the purpose, among others, of their hearing a motion for a new trial.

On the trial of the defendant, in the court of common pleas, before *Cummins*, J. upon an indictment for forging a note purporting to be signed by James Phelps, the said Phelps was admitted as a witness to prove the forgery, and also to prove the loss or destruction of the note. It appeared from the testimony of said Phelps, that he paid the said note to the defendant, supposing it to be genuine; he having given the defendant a similar note. It was admitted at the trial, that two actions had been commenced by the defendant, and were then pending, against said Phelps; one on the note which he acknowledged to be genuine, and also an action of slander for his charging the defendant with forging the other note.

The defendant was convicted, and the case came before this court on exceptions alleged by him to the admission of said witness. A petition for a new trial was also presented by the defendant, as is mentioned in the opinion of the court.

C. Allen and *Washburn*, for the defendant.

Austin, (Attorney General,) for the Commonwealth.

Shaw, C. J. The only question brought before the court by the bill of exceptions is, whether on an indictment for forgery, the person whose signature is alleged to be forged can be a witness to prove the forgery, and also the existence and loss of the note. This point was deliberately decided in the affirmative, more than thirty years ago, in the case of *Commonwealth* v. *Snell*, 3 Mass. 82. The same rule was again recognized and affirmed in the case of *Commonwealth* v. *Waite*, 5 Mass. 261;

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and it has ever since been considered a settled rule of law, and constantly practised upon.

But it is supposed that a distinction may be found in the consideration, that in the present case an action by the defendant against the prosecutor had been commenced, and was pending, when this indictment was found. This, it seems to us, can make no difference. The ground on which the prosecutor is admissible as a competent witness is, that though he may be interested in the question, he is not interested in the event of the suit, because the verdict and judgment in this suit could not be given in evidence in the suit against the prosecutor, and he will not gain or lose by its event. And this is equally true, whether the civil action were commenced by the defendant against the prosecutor before the indictment, or whether such action remained to be commenced afterwards. In either case the interest would be the same. The exceptions, therefore, are overruled.

After the argument on the exceptions, the defendant presented a petition to the court, in case the exceptions should be overruled, to grant him a new trial: *First*, on the ground of newly discovered evidence not known to him at the time of the trial, and having a material bearing upon the issue: *Secondly*, on account of some alleged unfair dealing with one or more of the jurors, during the trial, with a view to exert an influence on the mind of such juror, unfavorable to the defendant. It was objected, that no motion for a new trial could be received, whilst the exceptions were pending. *Cunningham* v. *Bell*, 5 Mason, 173. *Moran* v. *Dawes*, 4 Cow. 22.

Where a bill of exceptions is taken, and thus points of law, decided in the course of the trial, and not otherwise appearing, are made part of the record, with a view to a writ of error in another court, this is a very proper rule. There is no reason for sustaining a motion for a new trial on the merits, when the same party may have, or claim to have, a higher remedy, on grounds of law to be decided on the whole record, including the bill of exceptions, in a higher court. But where, as in our practice, the exceptions are taken in a summary way, to be submitted either to the same or to another court, to be decided up-

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on before judgment is entered, and especially where the exceptions and the motion for a new trial are to be considered and decided by the same court, there seems to be no good reason why both should not be heard together, or the one or the other considered first, according to the circumstances of the case. If the exception is of such a nature, that if decided one way, it must put an end to the case, on grounds of law, without regard to the merits, there would be a convenience in hearing the exceptions first; because it would render further discussion unnecessary or useless. But where the exception is taken to the admission or rejection of evidence, not going to the foundation of the action or defence, or where the exception is to the direction of the court, in matter of law; for example, in relation to the application of particular testimony, or to any matter not going to the foundation of the action or defence; it may be more proper to hear the motion for a new trial first; because, if a new trial is had, the same points may not be likely to arise, and a consideration of the exceptions, in detail, may be unnecessary and useless. The same considerations, we think, may apply where there is a motion for a new trial, and a motion in arrest of judgment, pending at the same time, before the same court.

We think therefore, it was no decisive objection to a motion or petition for a new trial in this court, if in other respects it could be properly entertained, that it was made whilst the case was pending on the exceptions.

We are then brought to the question, whether this court can grant a new trial, after the exceptions are disposed of, on the ground of newly discovered evidence, misconduct of the jurors, or for any other cause, not appearing in the exceptions, and for which new trials can by law be granted in cases tried in this court. It was argued by the Attorney General, that the authority and jurisdiction of this court are limited to a consideration of the questions arising on the exceptions, and if they are overruled, the cause is to be considered as remaining in the court of common pleas; and that if any motion for a new trial is to be made, it must be made there; and he relied upon the cases

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above cited, and also the cases of *Roosevelt* v. *Fulton*, 7 Cow. 107, and *Jackson* v. *Varick*, 7 Cow. 412. But the court are of opinion that this is not a correct view of the course indicated by our statute. The cases cited from New York are civil actions, depending upon statutes and practice different from our own, and cannot therefore much aid us in the construction of our statute.

The case under consideration depends upon a true exposition of the Rev. Sts. *c.* 138, § 11 *& seq.* After directing the mode in which exceptions shall be taken and allowed, it provides that thereupon all further proceedings in the case, in the court below, shall be stayed — with a single exception, to prevent an abuse of the privilege, in case it shall appear that the exceptions are frivolous, immaterial, or intended only for delay. The general rule therefore is, that all further proceedings in the case, in that court, shall be stayed. It further provides, § 12, that if, in the opinion of the presiding judge, any question of law shall arise, so important or so doubtful as to require the decision of the supreme judicial court, he shall, if the defendant desire it or consent thereto, report, &c. and thereupon all further proceedings, in that court, shall be stayed. It further provides that the party taking the exceptions shall recognize, with sufficient sureties, to appear at the supreme judicial court, and prosecute his exceptions with effect, and abide the sentence thereon, or shall stand committed, under a special order, for the like purpose. In this part of the Rev. Sts. there is a little apparent uncertainty and ambiguity, arising, not from the language, but from the manner in which the text is divided into sections and paragraphs. All these provisions seem taken from *St.* 1832, *c.* 130, § 5 ; and the commissioners, in their note appended to chapter 138, say that they intended to make no alteration in the law on this subject, except so far as the Rev. Sts. exempt appellants, and persons taking exceptions, from the duty imposed by the former statute of advancing fees for copies. In § 14 of the Rev. Sts. *c.* 138, the words "*in that case*," beginning a sentence in the third line, are intended to apply to the case of bringing up the cause by exceptions, in either of the modes mentioned in the preced-

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ing sections, and not simply to the case of a party standing committed. This results from a consideration of the language taken together, and from a comparison of this sentence with the statute of 1832, from which it was taken. The only difference between them is, that in the Rev. Sts. the same legal provisions are expressed in fewer words, and the whole of the language is condensed and abridged, conformably to the practice which is manifest through the whole work. Thus explained, the section provides, that in a case thus brought up by exceptions, the court shall have cognizance thereof, and shall decide the cause &c., and shall render such judgment and award such sentence, and make such order thereon, as law and justice shall require. And it further provides that a new trial may be ordered at the bar of this court, or the cause may be remanded to the court of common pleas, for a new trial there, as the justices of this court may direct.

These general and comprehensive terms are substituted for a much more detailed enumeration of powers, as expressed in *St.* 1832, *c.* 130, § 5, among which are these — "and said supreme judicial court may discharge such person, or proceed to sentence him, or may remand such case to the court of common pleas, for new trial, judgment, sentence, or such other proceedings therein as law and justice shall require. And if they shall so remand &c., they may require the party to recognize, or they may commit him to prison; and the said supreme judicial court shall certify to said court of common pleas their proceedings, determination and orders, and said court of common pleas shall proceed to try, pass sentence, or do whatever the said supreme judicial court shall have determined and ordered in such case." This last statute is not now in force; but still it is useful as a more detailed statement of the powers given to the respective courts by the comprehensive language of the revised statutes.

From this view of the statutes, it appears to us very manifest, that when the exceptions have been allowed by the court of common pleas, and not deemed frivolous, and when the party has recognized or been committed to appear at the supreme ju-

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dicial court, and abide any and all orders, &c., the court of common pleas ceases to have cognizance of the cause, and full cognizance thereof is transferred to the supreme judicial court for all purposes. It follows as a necessary consequence, that upon such allowance of exceptions, and recognizance or commitment, no motion for a new trial can be received by the court of common pleas; and if the party have a right to make a motion anywhere for a new trial, it must be in this court. Such we understand was the view of it, taken by the court of common pleas, on a motion made in this case, after the exceptions were allowed, and before the case came on for argument in this court.

But the revised statutes are explicit in the provision, that both this court and the court of common pleas may, at the term at which an indictment is tried, or within one year after, on petition or motion in writing, grant a new trial. It becomes, therefore, necessary to inquire what is the situation of a cause thus transferred to this court, and the power of the court over it, when it is entered in this court. Because it may be said, and certainly there is weight in the suggestion, that the clause in question is, in its natural construction, to be taken distributively, as if it had provided in terms, that each of the courts may grant new trials, in causes tried in said courts respectively. The stage, at which the cause is transferred by exceptions, is after a verdict against the defendant, and exceptions allowed in consequence of some decision in matter of law. In that stage, the cognizance of the *cause*, not of the exceptions merely, ceases in the court of common pleas; and, upon entry, is vested in the supreme judicial court. They assume it at that stage, and thenceforth every step, proper to the completion and final determination of the cause, is to be taken by this court. They may pass sentence, or they may remand for sentence. In order to pass sentence, they must examine the whole record; the indictment, to see if there be any crime charged; the pleadings, issue, and verdict, to ascertain what is found, and thereupon to determine whether there be a legal conviction, and for what offence, and what sentence is by law to be awarded. It is of course, therefore, open to a

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motion in arrest of judgment; that is, it is open for the defendant to show that the facts set forth in due and legal form, and found, do not constitute an offence punishable by law.

We are also of opinion, that it is open to a motion for a new trial. It is manifest from the provision cited, that it was the intention of the legislature, that the defendant should have the right of submitting a motion for a new trial, upon a proper cause shown; and it is quite clear that he can no longer move for a new trial, in the court of common pleas, though within the year, for the reasons before mentioned. The difference between a motion for a new trial, and a motion in arrest of judgment, is rather one of form than of substance. In both, the defendant, on being called on to show cause why he should not be sentenced, does undertake to show some good reason why sentence should not be awarded. In the one case, it depends upon matter apparent upon the record; in the other, the cause is equally sufficient, and equally sustained upon legal grounds; but these must be shown by evidence *aliunde*; but still upon judicial evidence, the competency of which is regulated by equally well settled rules. Such a distinction would make a valuable right depend upon the kind of legal and competent evidence, by which it must be established. It may sometimes occur, that from the discovery of new evidence, it would be perfectly in the power of the defendant to establish his innocence by plenary evidence, if he could avail himself of an opportunity to bring it before a jury. Between the trial and the sentence, it might be discovered that the conviction was the result of conspiracy and perjury, which can be fully demonstrated on another trial.

We are aware of the difficulty and inconvenience of sustaining a motion for a new trial, in this court, for causes arising in the trial before the court of the common pleas, because, in the course of practice, we can have no report showing the evidence and proceedings in that court. Sometimes, perhaps, the difficulty arising from this cause may be insurmountable. But we think this does not affect the authority and jurisdiction of the court over the subject matter. Other cases may occur, where the grounds are of such a nature, that without a report

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from the judge, the party moving for a new trial may be able to establish the merits of his case; as where the ground depends upon matter extraneous, like that of the misconduct of parties in tampering with jurors. In other cases, the newly discovered evidence may be of so decisive a nature, as to warrant a new trial, whatever may have been the evidence upon the first trial.

But the court are also of opinion, that where the time has not elapsed for making a motion for a new trial, in the court of common pleas, it is competent for this court to remand the cause to that court for the purpose, amongst others, of hearing a motion for a new trial. For, though the jurisdiction of that court is wholly superseded, by a transfer of the cause to this, by exceptions; yet when the cause is remanded, that court is reinstated in its jurisdiction, by force of the statute. A new recognizance is taken of the defendant, in this court, to appear in that, to abide its order and decision; or the party, if he fail to recognize, may be specially committed to jail to abide such order. From its entry in the court of common pleas, it is a new proceeding in that court, of which it will take cognizance, as if rightfully brought into that court by any other mode of legal proceeding.

It is under the same view of the jurisdiction of the two courts, that this court has in some instances, after a decision upon the exceptions, remanded the cause to the common pleas, for sentence.

It may be proper to remark, that the statute, which we have been considering, applies to the municipal court in the county of Suffolk, in the same manner as to the court of common pleas, in other counties; and of course the same considerations apply in case of exceptions from that court.

In the present case, as we find, on inquiry, that a year has not yet elapsed since the trial in the common pleas, and that upon this cause being remanded, it will still be open to a motion for a new trial, the order of this court is, that it be so remanded to the court of common pleas, for the purpose of hearing a motion for a new trial, and such other proceedings as the law of the case may require.

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JAMES MARSH & another *vs.* ASA WOODBURY & Trustee.

The provision in the Rev. Sts. c. 74, § 5, respecting the recording of mortgages of personal property, applies only to goods and chattels capable of delivery; and not to defeasible or conditional assignments of choses in action.

THIS case came before the court upon exceptions to the ruling of *Dewey*, J. The facts appear in the opinion of the court.

Newton, for the plaintiffs.

Merrick, for the trustee.

SHAW, C. J. The supposed trustee is the executor of the will of Moses Adams, and the object of the attachment is to hold a legacy, given by the will of said testator to his daughter, the wife of the principal defendant. The trustee disclosed an assignment of said legacy to one Zadock Woodbury, conditioned to be void on the payment of a certain sum. The assignee being summoned in, pursuant to the Rev. Sts. *c.* 109, § 17, to try the validity of the assignment, the plaintiff objected to the admission of the assignment as evidence, without showing that it had been recorded in the town clerk's office; contending that it was a mortgage of personal property, and so, by the Rev. Sts. *c.* 74, § 5, not valid unless so recorded.

This objection was overruled by the judge who sat at the trial.

The court are of opinion, that the language of the statute, taken with the context and subject matter, applies only to goods and chattels capable of delivery, and not to the defeasible or conditional assignment of a chose in action; and therefore that it is not necessary to the validity of such assignment of a chose in action, that it be recorded in the town clerk's office.

Exceptions overruled.

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Trustees of the State Lunatic Hospital *vs.* Inhabitants of the County of Worcester.

A jury has authority, under the Rev. Sts. c. 24, § 18, to make alterations in a highway that has been located anew by county commissioners.

A possessory title to land, over which a highway is located, is sufficient to entitle the party in possession, who is aggrieved by the doings of the commissioners, to have a jury to determine the matter of his complaint,

The county commissioners, in 1838, upon the application of the town of Worcester, located anew a certain highway, called Summer Street, in said town, and included therein a strip of land then in the occupation of the Commonwealth, by its agents, the officers of the State Lunatic Hospital. The trustees of said hospital thereupon preferred a petition to said commissioners, that a jury might be summoned and empannelled "to alter so much of the said new location of said highway as lies opposite and adjoining to said lands of said hospital." A jury was accordingly summoned, &c. and returned a verdict making an alteration in said highway, as prayed for by said trustees. This verdict was accepted by the court of common pleas, and the respondents appealed to this court.

The land which was included in the highway, as laid out anew by the commissioners, was within the fence that enclosed the estate conveyed to the Commonwealth by S. B. Thomas, in 1830, for the purpose of erecting thereon a lunatic hospital. By said conveyance, said estate was bounded westerly on Summer Street. Said fence was erected after said conveyance, and not on the site of the fence that was standing at the time of that conveyance.

Washburn, for the respondents.

Merrick, for the petitioners.

Wilde, J. This case comes before us by appeal from the judgment of the court of common pleas accepting the verdict of a jury, duly summoned by the sheriff of the county, on the application of the petitioners to alter so much of a certain highway in the town of Worcester as was opposite and adjoining to their land. This highway had been located anew by the county

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commissioners, agreeably to the Rev. Sts. c. 24, § 9. The jury made the alterations prayed for by the petitioners, and the respondents object to the legality of their proceedings, on two grounds. 1st. Because the jury had no authority to alter the highway as located anew and altered by the county commissioners. 2d. Because the highway, as re-located by the county commissioners, did not pass over or across any of the lands of the petitioners, and the jury therefore had no right to make the alteration upon their prayer or application.

In support of the first objection, it has been argued that a jury summoned and empannelled in pursuance of the Rev. Sts. c. 24, § 13, had no authority to make any alteration in an old highway re-located according to the 9th section, by the county commissioners, although the same had been re-located with alterations. But we are of opinion that this is not in accordance with the manifest construction of the 13th section. That section provides that "any party, who shall be aggrieved by the doings of the commissioners, either in laying out, altering or discontinuing any highway, or in the estimation of his damages occasioned thereby, may have a jury to determine the matter of his complaint, &c. provided, that the jury shall not revise the judgment of the commissioners, as to the common convenience and necessity of laying out, or of altering, the way in question; but they may make any alterations, that may be prayed for, between the termini, as established by the commissioners, so far as the jury shall think such alterations to be necessary and proper." This section applies in express terms to all highways laid out or altered by the commissioners. And as the commissioners, in re-locating the highway in question, made sundry alterations in the former location, the jury, we think, had an undoubted right to revise the judgment of the commissioners, to a limited extent, and to make such alterations between the termini, as they thought necessary or proper.

It has, however, been argued, that if the jury had this right in respect to any alterations made by the commissioners, they had not any right to alter such parts of the highway as were laid out anew in conformity to the original location. If this were a

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question as to the right of the jury to *assess damages* in such a case, there would be great weight in the argument. But we think the right of the jury, as to making reasonable and proper alterations in the highway, is not thus restricted. The distinction contended for might lead to great difficulty and uncertainty in its application to ancient highways, the original location of which could not be clearly ascertained. Whether that difficulty exists in the present case, we do not know; for it does not appear with certainty, whether the highway, as re-located by the commissioners, opposite and adjoining the lands of the petitioners, or the alterations by the jury, do or do not conform to the original location. But if it did appear that the commissioners made no alteration in this part of the highway, still we should be of the opinion that the jury had the right to make the alterations prayed for by the petitioners. The whole highway had been located anew with certain alterations, and these alterations might render other alterations convenient and beneficial. A general power is given to a jury to make alterations between the termini of all highways laid out or altered by the county commissioners, with no other restriction but that they shall not revise the judgment of the commissioners as to the common convenience and necessity of laying out or of altering such ways.

We are, therefore, of the opinion that this exception to the verdict of the jury cannot be sustained.

And we are of the same opinion as to the other exception. Whether the petitioners or the Commonwealth have a good and perfect title to the land claimed, we do not undertake to determine; that depends on the original location of the highway But they have a good possessory title, and that is sufficient to main tain their petition. Any party aggrieved at the doings of the commissioners may have a jury to determine the matter of his complaint.

The petitioners were in the undisputed possession and occupation of the lands over which the highway was established by the commissioners, and it is very clear that possession alone is sufficient to maintain their petition, and to entitle them to a jury to determine the matter of their complaint.

Judgment of the court of common pleas affirmed.

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NATHAN BEMIS *vs.* TRUMAN CHARLES.

Where in a suit to recover pay for goods sold, the plaintiff offers a witness whom the defendant proves that the plaintiff has declared to be jointly interested with him in the goods, a release to the plaintiff, by the witness, of all his interest in the goods, renders him a competent witness for the plaintiff.

A notice to a party to produce a paper in his possession is sufficient to authorize the admission of parol evidence of the contents thereof, if such notice be so framed that the party cannot doubt what paper is meant.

A. sold and delivered lumber to B., no price being mentioned, under an agreement that it should be applied by B. towards payment of a debt due to him from A. for goods sold and delivered, and that the amount thereof should be deducted from such debt, on a settlement of accounts between the parties. B. afterwards sued A. for goods sold, and A. filed in offset his account against B. for the lumber. B. resisted the offset, and A. thereupon, by leave of court, withdrew his said account, and B. took judgment for the full amount of his claim against A. *Held*, that A. might well maintain indebitatus assumpsit against B. to recover pay for the lumber.

INDEBITATUS ASSUMPSIT to recover pay for a quantity of lumber specified in a bill of particulars filed in the case.

At the trial, in the court of common pleas, before *Cummins*, J. the plaintiff offered N. Bemis, Jr. his son, as a witness, who was rejected by the judge, on the defendant's giving evidence of the plaintiff's declarations that he *and his said son* furnished the defendant with the lumber sued for. The son thereupon executed a release of all his interest in said lumber, and was admitted and examined (the defendant objecting) as a witness for the plaintiff.

In the course of the trial, a witness, who was called by the plaintiff, was asked if the defendant had exhibited to him a bill in which the lumber now in question was charged by the defend ant to the witness. The defendant objected to inquiring of the witness as to the contents of a paper which the defendant had not received notice to produce. The plaintiff then exhibited the following written notice which had been given to the defendant: "To Truman Charles. Upon the trial of the action, Nathan Bemis against you, the plaintiff hereby gives you notice to produce the account or memorandum, kept by you or your clerk, of boards, clapboards, and other lumber, delivered by the plaintiff or his son Nathan Bemis, Jr. at or near your store in

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Spencer, in the year 1835, for building the dwellinghouse of James Oldham. Nathan Bemis, by his attorney, I. M. Barton. March 4, 1840." The witness stated that the paper presented to him by the defendant contained, in addition to the lumber furnished by the plaintiff, "a store account" which the defendant had against the witness, and also charges for other lumber. The judge thereupon permitted the plaintiff to inquire of the witness as to the particulars of the account on said paper.

It appeared that in the autumn of 1834, the plaintiff was indebted to the defendant on an account for goods sold, to the amount of about $90; and there was evidence tending to prove that in the same year the defendant purchased of the plaintiff the lumber in question, under an agreement that it should be applied to the payment of what the plaintiff owed him on said account, and that on a settlement of the same, the amount of the lumber should be deducted therefrom. Such settlement was never made; and on the 17th of November, 1838, the defendant commenced an action against the plaintiff to recover said account for goods sold. In that action, the present plaintiff filed his said account for lumber in offset, and brought into court a small sum for the balance against him upon the accounts between the parties. At the trial of said action, the allowance of the account thus filed in offset was resisted by the present defendant, and thereupon, as it appeared that the money brought into court was not sufficient to meet the balance of accounts, the present plaintiff obtained leave to withdraw, and did withdraw, his account so filed in offset. The present defendant then took judgment for the full amount of his account for goods sold, and that judgment has been satisfied.

On these facts, the defendant contended that this action could not be maintained, as the lumber had been delivered in payment or part payment, for said goods sold. But the judge ruled that said lumber could not be regarded as delivered in payment of the account for said goods; that the agreement to make such application of the lumber, on settlement, was executory; and that, as the defendant had refused to allow such application thereof, the plaintiff might well maintain this action.

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The jury returned a verdict for the plaintiff, and the defendant alleged exceptions to the aforesaid rulings of the judge.

Washburn, for the defendant. The plaintiff's son was not a competent witness, notwithstanding the release. He ought to have been a party to the suit. 1 Stark. Ev. 84. 3 Stark. Ev. 1061. *Simons* v. *Smith*, Ry. & Mood. 29. *Hall* v. *Cecil*, 6 Bing. 181. *Evans* v. *Yeatherd*, 2 Bing. 133. The notice to the defendant to produce the plaintiff's bill was not such as warranted the admission of parol evidence of its contents. Roscoe on Ev. 5. Indebitatus assumpsit will not lie in this case, as the evidence shows a special contract. Besides, the plaintiff's claim for the lumber had, on a previous occasion, been before the court, and the disposition then made of it is a bar to his recovery. *Smith* v. *Whiting*, 11 Mass. 445. *Loring* v. *Mansfield*, 17 Mass. 394. *Homer* v. *Fish*, 1 Pick. 435. *Whitcomb* v. *Williams*, 4 Pick. 231. See also *Bilbie* v. *Lumley*, 2 East, 469. *Marriott* v. *Hampton*, 7 T. R. 269. *Wilby* v. *Harris*, 13 Mass. 496.

C. Allen and *Barton*, for the plaintiff. The release rendered the plaintiff's son a competent witness. 1 Phil. Ev. Part I. c. 5, § 8. The jury have decided that the plaintiff and his son were not jointly interested, by finding a verdict for the plaintiff. If they had been jointly interested, the non-joinder of the son would have availed the defendant on the general issue. *Baker* v. *Jewell*, 6 Mass. 460. *Converse* v. *Symmes*, 10 Mass. 377. The notice to the defendant to produce the bill was sufficient. No particular form of notice is necessary. It is sufficient, if it be intelligible to the party. Howe's Pract. 228.

The agreement that the lumber should be taken by the defendant in payment was clearly executory only, as no price was agreed on, and it was to be adjusted on a settlement. It was treated by the parties as a set-off. *Sargent* v. *Southgate*, 5 Pick. 319. *Evans* v. *Prosser*, 3 T. R. 186. The defendant has elected not to consider the lumber as delivered in payment; and he had a right so to do, as it was not valued by the parties, nor in fact received in payment. *Buddicum* v. *Kirk*, 3 Cranch, 293. *Howe* v. *Mackay*, 5 Pick. 46. An executory accord is

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of no avail. *Watkinson* v. *Inglesby*, 5 Johns. 392. The plaintiff withdrew his account from the files, in the former action, by leave of court, and the judgment in that case, therefore, in no way affects his present right to recover. See *Wheeler* v. *Board*, 12 Johns. 363. *Griggs* v. *Austin*, 3 Pick. 20. *Fowler* v. *Shearer*, 7 Mass. 14. *Rowe* v. *Smith*, 16 Mass. 306. *Lazell* v. *Miller*, 15 Mass. 207.

WILDE, J. At the trial of this cause in the court of common pleas, an objection was made to the competency of a witness offered by the plaintiff, on the ground that the witness had, jointly with the plaintiff, furnished the lumber sued for. The witness thereupon executed a release of all interest in the lumber, and was then permitted to testify. It is still objected that he was interested in the event of the suit, as he would be liable for contribution for costs, in case the defendant should recover judgment. But this ground of objection is removed by the release. The witness, after giving the release, had no longer any interest in the subject matter of the action. He could claim no part of the damages, if the plaintiff should recover, nor would he be liable to contribution for costs, if the defendant should recover. The action is not prosecuted for his benefit, but solely for the benefit of the plaintiff.

The defendant's counsel object also to the admission of parol evidence to prove the contents of a bill of lumber in his possession, because there had been no sufficient notice to him to produce it. The notice does not describe the bill with perfect accuracy; but we think it impossible for the defendant to have doubted as to what bill of lumber was intended. It does not appear, nor is it suggested, that there is any other bill of lumber in which the plaintiff has any interest, excepting the one the contents of which were proved at the trial. We think therefore that the notice was sufficient, and that the parol testimony was rightly admitted.

The last and principal exception, on which the defendant relies, relates to the instructions of the court to the jury. They were instructed, that upon the facts proved, the lumber sued for could not be regarded as delivered in payment of the defend-

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ant's account against the plaintiff: That the agreement to make such application of the lumber on settlement being executory, and the defendant having refused to allow such application, the plaintiff might maintain this action.

These instructions we think are fully sustained by the evidence. The agreement was certainly executory, and was to be executed on the settlement of the accounts between the parties. No such settlement has ever been made, and the defendant refused to allow the lumber to be applied to the reduction of his demand against the plaintiff. The price of the lumber was not agreed upon. This was left to be ascertained at the settlement. These circumstances clearly prove that the agreement under which the lumber was delivered was executory, and that the execution of it has been prevented by the defendant. It cannot therefore be set up by him in bar of the plaintiff's claim. That agreement must now be considered as waived by both parties, and consequently the plaintiff may well maintain his action on an implied assumpsit.

Exceptions overruled.

JONATHAN WHIPPLE, Executor *vs.* ARNOLD ADAMS & others.

A testator, after bequeathing to his wife a portion of his property, added a clause to his will, in which he requested that a person, to whom he had bequeathed nothing, might provide for her a chaise, or other suitable conveyance, and attend her whenever and wherever she might wish to go, for a suitable compensation, if she should desire it. *Held*, that this was too vague and indefinite to be construed as a legacy to the wife.

THIS was an appeal, taken by the executor of the last will of Moses Adams, from a decree of the judge of probate for this county.

The testator, after bequeathing to his wife a certain portion of his property, added this clause to his said will: "And it is my request that John A. Whipple may provide for her a chaise, or other suitable conveyance, and attend her whenever and wherever she may wish to go, for a suitable compensation, if she shall desire it."

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Said John A. Whipple was a son of the appellant, and a grand nephew of the testator's wife, but was not an heir of the testator, nor one of his legatees.

The appellant made application to the judge of probate to pass a decree that so much money should remain in his hands, as should produce an income sufficient to meet the expenses to be incurred in carrying into effect the foregoing clause in said will. This application was rejected.

It was agreed by the parties, that if the said clause in the will was to be regarded in law as a legacy, the case should be remitted to the judge of probate, that he might settle the amount of the allowance to be made in that behalf.

C. Allen, for the appellant, cited *Passmore* v. *Passmore*, 1 Phillim. 218. 1 Williams on Executors, 56.

Newton, for the appellees, cited 2 Story on Eq. § 1069. *Sale* v. *Moore*, 1 Simons, 534. *Malim* v. *Keighley*, 2 Ves. Jr. 533.

WILDE, J. That a request contained in a will may be, in many cases, equivalent to a command, or an express direction, cannot be doubted. Thus, if the executor were requested to pay a certain sum of money to another, that would be considered as a legacy which the executor would be bound to pay. So if a legacy be given to A., and the will contain a request that he should pay over a part thereof to B., this would be construed as a legacy to B. In such cases, the testator having a right to make such a disposition of his property as he thinks proper, the expression of his wishes is deemed to be the expression of his will, and a request is equivalent to a command.

But we think it difficult to apply this rule of construction to the present case. John A. Whipple was a stranger, to whom no property was given by the will. The testator, therefore, had no right to command his services; and no provision was made in the will for the accommodation of the widow in case said Whipple should decline to comply with the testator's request. This leaves it doubtful whether he intended that she should be accommodated with a chaise or carriage at all events.

Again, it is left doubtful to what extent, and at what expense,

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the testator wished his widow to be accommodated. Was a horse as well as a chaise to be kept solely for her use; or did he expect that Whipple would accommodate her with the use of his own horse and chaise, as occasions might require? It is also uncertain how Whipple was to be compensated for his services, whether by the widow, out of the property given to her, or from the rest and residue of the testator's estate.

Upon the whole, the clause in question is so vague and indefinite, that it cannot be so construed as to entitle the widow to a legacy. (See Bac. Ab. (Dodd's ed.) Legacies, B. 1.)

Decree of the judge of probate affirmed.

MOSES MORTON & wife *vs.* WILLIAM PERRY, Executor.

Promissory notes and other securities for the payment of money will pass by a bequest of money, where such is manifestly the intention of the testator.

A testator, after reciting that he had sold his real estate and paid to his heirs, in cash, the largest part of their portions, and that he was making his will, "dividing the residue," gave legacies to his wife and two of his heirs, in full of their portions: He then bequeathed to his three other heirs all the money which should be left at his decease: At the date of his will, almost all his property consisted of promissory notes and money on hand: The amount of money then on hand could not be ascertained; but he commonly had not more than twenty or thirty dollars: At his decease, he had promissory notes to the amount of more than $ 2800, and only $ 31 in money. *Held*, that the money due on his notes, at his decease, passed by the bequest of money left.

THIS was an appeal by Moses Morton, and his wife Mary Ann, a granddaughter and heir at law of Tyler Perry, from a decree of the judge of probate for this county.

Said Perry, on the 30th of October, 1833, made his last will, beginning thus: "Having disposed of all my real estate, and paid out to my heirs the largest part of their portion in personal estate, in cash, I do make and publish this my last will and testament, dividing the residue in manner and form following." He then made bequests to his wife, his oldest son, and his said granddaughter, which he declared to be their respective portions in full. To his son William, whom he constituted his executor, he bequeathed his household furniture and farming tools; and

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$100 to a religious society in Athol, to be put on interest, &c. All the money which should be left at his decease, he bequeathed, by the fourth clause in his will, to his said son William, and to his two other heirs at law, viz. Nancy Wheelock, and Clarissa Goddard, to be equally divided among them.

The said executor rendered his account of administration, by which it appeared that after payment of charges of administration, and all the legacies, except that given by said fourth clause, there remained in his hands $2343.36. Said account was allowed by the judge of probate, and he thereupon ordered the executor to dispose of said balance "according to said will." The appellants afterwards "made application to said judge to decree a distribution of the said balance among the heirs at law of the deceased, as intestate estate; but the judge decreed and determined that said balance was testate estate, and refused to allow said application." This appeal was then taken.

Before the said account was settled by said executor, the legacy, given by the will to Mrs. Morton, was received and accepted by her husband.

It was agreed by the parties, that at the time when the testator executed his will, "his property consisted of a pew in a meetinghouse in Athol, a horse and chaise, various promissory notes against different individuals, and what money he then had on hand: That he sometimes had a considerable amount of money on hand, but that he commonly did not have more than twenty or thirty dollars." At the time of his decease, he had $31 only in cash; but he had promissory notes to the amount of about $2354.

Washburn, for the appellants, argued that the notes, as well as the pew, were intestate property. They are not mentioned in the will, and extrinsic matter is not to be resorted to, when the testator's meaning appears in the will itself. *Wadsworth* v. *Ruggles*, 6 Pick. 68. Legacies by implication are not to be supported, unless the testator's intention is clear. *Grout* v. *Hapgood*, 13 Pick. 164.

The purpose, expressed in the preamble to the will, of dividing the residue of the testator's property, cannot be carried into

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effect, unless the bequeathing clause is sufficient to do it. *Lippett* v. *Hopkins*, 1 Gallis. 458. *Bullard* v. *Goffe*, 20 Pick. 252.

A legacy of money is adeemed by a loan thereof and taking notes therefor by the testator. *Stanley* v. *Potter*, 2 Cox, 180. 2 Fonbl. (Laussat's ed.) 589, and *notes*. 2 Williams on Executors, 820. 1 Roberts on Wills, *c*. 2, § 19.

The notes did not pass by the bequest of "money left." *Stuart* v. *Marquis of Bute*, 11 Ves. 662. *Fleming* v. *Brook*, 1 Sch. & Lef. 318. *Penniman* v. *French*, 17 Pick. 404. *Mann* v. *Mann*, 1 Johns. Ch. 231.

The testator, by declaring that certain of the legacies given by him should be "in full" of the legatees' portions, showed that he mistook the amount of his property; and such a mistake will not affect them. *Campbell* v. *French*, 3 Ves. 321.

C. Allen, for the appellee. Though the word "money," when taken alone, will not include notes, yet where from the whole will it is clear that the testator intended to pass them under that denomination, his intention shall be carried into effect. *Gallini* v. *Noble*, 3 Meriv. 691. 2 Williams on Executors, 753, 754. In this case, there can be no doubt, on inspecting the different parts of the will, and taking into consideration the state of the testator's affairs, that by "money left" he meant money due to him, as well as money on hand. The condition, &c. of his property, is to be regarded, in ascertaining his intention. *Sargent* v. *Towne*, 10 Mass. 303. 2 Roberts on Wills, *c*. 1, § 4. 3 Meriv. *ubi sup*.

Wilde, J. The balance in the hands of the executor was received by him in payment of sundry notes of hand due to the testator, excepting $31, which was left in cash at the time of his decease. These notes of hand were not mentioned in the will, and were not disposed of thereby, unless they passed under the following clause. "Item 4th. I give unto Nancy Wheelock, Clarissa Goddard, and William Perry, all the money which is left at my decease, to be equally divided between them."

It is certainly true, that by a gift or bequest of money, notes

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of hand and other securities for the payment of money will not pass, unless it appears by the will that it was the intention of the testator to bequeath them. And the question is, whether in the present case such an intention is manifested in the will in question. And we think that it is. By the first clause in the will it appears clearly that the testator intended to dispose of all his property. The words are, "Having disposed of all my real estate, and paid out to my heirs the largest part of their portion in personal estate, in cash, I do make and publish this my last will and testament, dividing the residue in manner and form following."

At the time of making the will, the testator was possessed of very little property, excepting the notes of hand in question; it consisted of a pew in the meetinghouse, a horse and chaise, and his household furniture and farming tools, which furniture and tools were bequeathed to his son William Perry. The other property was nearly sufficient to pay the legacies specified in the will. This being the state of the testator's property, it seems incredible that he should have omitted by mistake to make any disposition of the large amount of money due to him on his notes of hand; and the inference is strong that he intended by the words, "all the money left at my decease," to include money due, as well as money on hand. There is another consideration which strongly confirms this inference. It is agreed that the testator commonly had but little money on hand, not more than twenty or thirty dollars.

Now it cannot be credited, that it was the intention of the testator to dispose of such an inconsiderable sum, dividing it too among three legatees, and to leave nine tenths of his property undisposed of. We think he considered the clause in question in the nature of a residuary bequest, although it is not expressly so declared. We cannot doubt that his intention was that his money at interest, at the time of his decease, should be collected by his executor, and with the money on hand should be paid over to the legatees who now claim it, except so much thereof as might be required to pay the specific legacies and all charges

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of administration. Any other construction of the will would in our opinion be inconsistent with the manifest intention of the testator, and too unreasonable to be admitted.

Decree of the judge of probate affirmed.

GEORGE B. SLATER & another *vs.* DEXTER RAWSON.

Where a deed of a lot, in an extensive tract of woodland, described it as "running south by T.'s farm, so far as to include 150 acres"; it was held that the jury were authorised to extend the line of the land conveyed beyond the southerly line of T.'s farm, where the other boundaries, which were established by satisfactory proof, and the whole description of the granted premises, clearly showed that the recital of T.'s farm, as the extent of the southern boundary, was a defective and imperfect description of that boundary.

If a grantor of land is not seized thereof when he makes his deed of conveyance, his covenant of warranty does not attach to the land and run with it; and he, therefore, is not liable to an action, by the assignee of his grantee, for breach of such covenant.

Where an assignee of a grantee, in an action of covenant against the grantor, avers and proves that the grantor had neither seizin nor title, at the time of his grant, the grantor is not estopped to rely on his want of seizin as a defence to the action on the covenant of warranty.

Where facts, stated in a report of the evidence at the trial of the cause, and conceded by both parties, show an objection to the plaintiff's recovery, which cannot be removed by further proof, the court will consider such objection open, though it was not raised at the trial.

THIS was an action of covenant broken to recover damages for breach of the covenants of right to sell, and of warranty, contained in a deed from the defendant, dated March 5th, 1821, conveying the premises hereinafter described to Samuel Slater and John Tyson, through whom, by several mesne conveyances, the plaintiffs made claim as assigns and subsequent purchasers.

The case was tried before *Dewey*, J. and the parties afterwards stated the following facts, in the form of a report of the evidence, &c. at the trial.

The defendant's said deed to said Slater and Tyson described the granted premises as "a parcel of land bounded beginning at a heap of stones, it being the southeast corner of the King lot; thence north, 26 degrees 30 minutes east, by said King lot,

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117 rods to a pitch pine tree with stones about it; thence east, 3 degrees south, by the Thompson lot, 169 rods to a stake and stones; thence east, 15 degrees south, by land of said Rawson, 100 rods to a stake and stones; thence west, 19 degrees south, by the Seaver lot, 221 rods 9 links to a clump of black oak trees; thence west 1¼ degrees north, 108 rods 23 links, by land of said Rawson, to the first mentioned bound; containing 130 acres." Said Tyson afterwards conveyed his right and interest in said land to said Slater, and the plaintiffs claim under said Slater.

The alleged breaches of the covenants in the defendant's said deed, as above mentioned, were, that Elisha Jacobs, on the 9th of September, 1839, entered upon 22 acres, (part of the premises above described,) bounded beginning at a stake and stones mentioned in the defendant's deed as next after the pitch pine tree therein mentioned, on the north side of said lot, being the third bound therein mentioned; thence east, 15 degrees south, 100 rods to a stake and stones; thence west, 19 degrees south, by the Seaver lot, 118½ rods to a stake and stones; thence north, 5 degrees 37½ minutes east, 61 rods to a stake and stones by said lot; thence east, 3 degrees south, 12½ rods to the bound first mentioned — and ousted the plaintiffs.

The plaintiffs, to sustain this action, introduced sundry deeds to show that their ouster from said 22 acres was rightfully yielded to by them; viz. a registered deed, dated May 6th, 1782, from John Rawson to William Sears, under whom said Jacobs, by sundry mesne conveyances, claimed title. The description of the land, conveyed by this last mentioned deed, was thus: "A certain tract of land, situate in said Gore of land, joining partly on Oxford land, and partly on Douglas west line, and is bounded, beginning at the southwest corner at a heap of stones, being the southwest corner of a 200 acre lot of land belonging to Edward Davis, Esq. in Douglas line, as supposed; then running northerly on Douglas line, by said Davis's land, to Oxford line; then running westerly until it comes to Thompson's farm, so called, now in possession of Benjamin Davis; then running south, about five degrees west, by said

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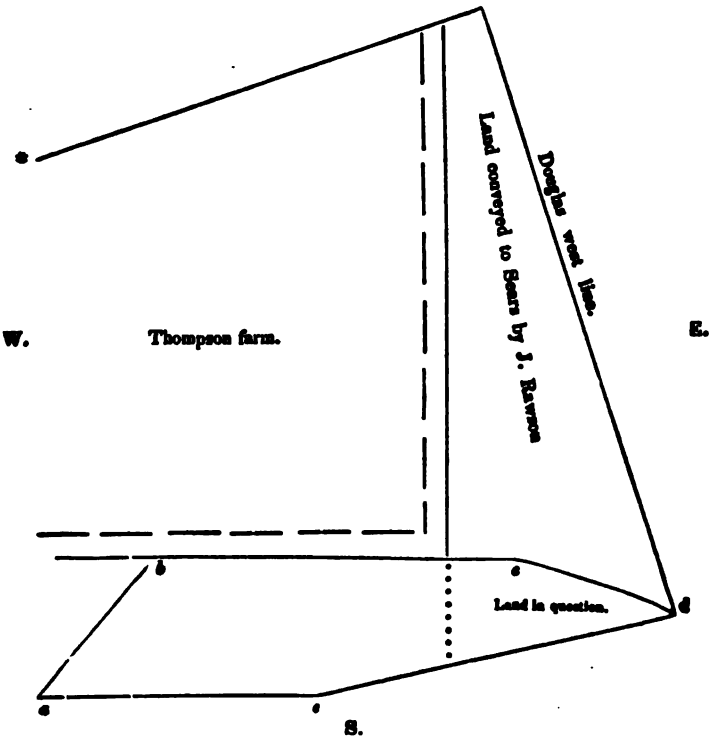
Thompson's farm, so far as to include 150 acres; thence running east, by said John Rawson's land, to Douglas west line aforesaid; then northerly, on said Douglas line, to the bound first mentioned." *

A witness was called by the plaintiffs to testify as to a recent survey made by him of the Thompson farm, and of the adjacent land. He produced a plan made by him, and also a copy of a plan and survey of the same farm, made by William Chandler, in 1727, and transferred to the plan made by the witness. He fixed the southwest corner of the Davis lot, referred to in



a. Starting point in D. Rawson's deed to Slater and Tyson.
b. Pitch pine tree,
c. d. Heaps of stones, } mentioned in said deed.
e. Black oak trees,

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the deed from John Rawson to Sears, and designated it on his said plan.

The defendant contended that the Thompson lot was embraced within the broken lines on the plan, and that the complement of 150 acres could be had under the deed last mentioned, without running further south than the land in controversy. The plaintiffs contended that the Thompson lot was what is designated on the plan as the unbroken line; and that, in order to obtain the 150 acres, it was necessary to extend as far south as the south line of the parcel in controversy.

Evidence was introduced, as to the existing ancient monuments, tending to show that the Thompson lot, in 1782, included the area between the broken and unbroken lines. It appeared that the premises were a part of a large tract of woodland, several miles in extent, no part of which was divided by fences; and there was no evidence of any actual occupation, by any of the claimants, of the contested premises, until recently; and that when John Rawson conveyed to Sears, he owned lands extending further south than the parcel in controversy, and including it.

The defendant contended, 1st. That the Thompson lot, having been referred to, both in his deed to Slater and Tyson, and in John Rawson's deed to Sears, was to be regarded as a monument by which the rights of the parties were to be governed, instead of lengths of line or points of compass; and that the claimants under the deed to Sears had no right to extend the limits of their grant further south than the southern line of the Thompson farm; and consequently, that said deed did not embrace the land in dispute. He further contended, 2d. That if the deed to Sears embraced the land in dispute, he (the defendant,) was never seized of the same, and therefore nothing passed by his deed, and that the measure of damages must be the money paid, and interest.

The judge reserved these questions, and permitted the plaintiff to give evidence tending to show that the Thompson farm was the area bounded by the unbroken line, and that, in order to include 150 acres between the Thompson lot and the line of Douglas, and extending southerly from Oxford line, it would

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embrace the land in dispute, and extend further south than the southerly line thereof: And the jury were instructed, that if the Thompson farm was bounded by the unbroken line on the plan, the plaintiffs were entitled to recover, and, if entitled to recover, that the measure of damages would be the value of the 22 acres at the time of the ouster, and interest. The jury found for the plaintiffs and assessed the damages at $500.

Judgment to be rendered on the verdict, or a new trial to be ordered, as the court may direct.

Washburn, for the defendant.

C. Allen, for the plaintiffs.

DEWEY, J. This is an action to recover damages for the breach of certain covenants in a conveyance of land made by the defendant to Samuel Slater and John Tyson, through whom, by sundry conveyances, the plaintiffs derive their title as assignees and subsequent purchasers. The covenants in the deed of the defendant are in the usual form, embracing the covenants of seizin and right to convey, a covenant against incumbrances, and also a covenant of warranty. The breach alleged in the declaration is, that one Elisha Jacobs, having an elder and better title than that of the defendant, entered upon the land, claiming title thereto, and that the plaintiffs, admitting his superior title, voluntarily surrendered the possession to him. To establish the title of Jacobs, the plaintiffs offered in evidence a deed from one John Rawson to William Sears, dated May 6th, 1782, and sundry other deeds conveying this title, as derived from Sears, and vesting it in Jacobs. The defendant admitted that the deed from John Rawson was prior in time, to that under which he claimed to have acquired title; but he contended that the deed of Rawson to Sears did not include the land which the plaintiffs had thus voluntarily surrendered to Jacobs. This presented a question of boundary, and much evidence thereon was submitted to the jury. In the course of the inquiry as to the boundaries of the land conveyed by Rawson to Sears, a question arose as to the construction to be given to that part of the description of the land in this deed, which is contained in the following words: "Thence running south, about five degrees west, by said Thomp-

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son's farm, so far as to include 150 acres ;" it being contended by the defendant, that the grantee could not, under that description of the land, extend his line beyond the southerly line of the Thompson farm, but must be limited by that as a monument. But it was ruled, that it was competent for the jury, in fixing the location and boundaries of the Sears lot, to extend the line of the same beyond the southerly line of the Thompson farm, if taking the other boundaries, which were established by satisfactory proof, and the whole description of the land conveyed, they clearly show that the recital of the Thompson farm, as the extent of the boundary, was a defective and imperfect description, as to this part of the land conveyed. To this ruling, as it seems to the court, there can be no valid objection. The recent case of *Clark* v. *Munyan*, 22 Pick. 410, fully sustains it, and the same principle has been frequently adopted.

The only other question, upon which any opinion in matter of law was given at the trial before the jury, was upon the subject of damages. The jury were directed, if they should find for the plaintiffs, to assess the damages at the value of the land at the time of the voluntary surrender of it by the plaintiffs upon the entry by Jacobs, with interest from that time ; and this, as we understand, is not denied by the defendant's counsel to be the correct rule for assessing the damages, if the plaintiffs can maintain their action. But upon the argument before us, upon the case as stated by the parties, the defendant insists, that as he was not seized of the land, which is now the subject of controversy, at the time he executed the deed to Slater and Tyson, and so nothing passed by his deed to his immediate grantees, and they therefore could pass no estate, nor any covenants, to an assignee, which would authorize an action in his own name, he is not liable to the plaintiffs, to any extent, on his covenants.

The distinction as to the legal effect of the different covenants usually introduced into our conveyances, however little it may have been understood or regarded prior to the cases of *Marston* v. *Hobbs*, 2 Mass. 433, and *Bickford* v. *Page*, 2 Mass. 455, is now very well settled. The covenants of seizin and right to convey are to all practical purposes synonymous

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covenants; the same fact, viz. the seizin in fact of the grantor, claiming the right to the premises, will authorize both covenants, and the want of it is a breach of both. But upon these covenants no action can be maintained in the name of an assignee or subsequent purchaser; for if broken at all, they are necessarily broken at the moment of the execution of the deed; and not running with the and, they do not pass by a subsequent conveyance of the land. The covenant of warranty, on the other hand, is a covenant running with the land, and may be made available to a subsequent purchaser, however remote, if the conveyances are taken with proper words to pass the covenant. But to support an action by an assignee, on the covenant of warranty, it is necessary that the warrantor should have been seized of the land; for, by a conveyance without such seizin, the grantee acquires no estate, and has no power to transfer to a subsequent purchaser the covenants in his deed; because, as no estate passes, there is no land to which the covenants can attach. If therefore the defendant, at the time of the making of his deed to Slater and Tyson, was not seized, then the covenant of warranty did not pass to the plaintiffs as assignees, and the only liability of the defendant is upon his covenant of seizin, which covenant, for the reasons already stated, is wholly unavailable to the plaintiffs.

It is to be taken as established by the finding of the jury, and is also in accordance with the pleadings on the part of the plaintiff, that the defendant, at the time of making his conveyance, had no legal title to the twenty-two acres of land, which the plaintiff has yielded up to the claim of Jacobs; but that the title to the same was then, and had been for a long period previously, in William Sears and those claiming under him. The further iquiry then is, whether the defendant was seized in fact of these premises, claiming right thereto, at the time of executing his deed to Slater and Tyson.

The case, as stated by the parties, in the report, finds that the premises, which are the subject of this controversy, were a part of a large tract of woodland unenclosed by fences, and of which there had been no actual occupation by any of the parties. Taking these facts to be correctly stated, there was

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clearly no seizin in fact, in the defendant, acquired by an entry and adverse possession. The rule, as to lands that are vacant and unoccupied, that the legal seizin follows the title, seems to be applicable here; and having ascertained in whom is the legal title, that also determines in whom the seizin is. But the plaintiffs have alleged in their declaration, and established by their evidence, the fact that the legal title to the land surrendered was not in the defendant at the time of the execution of the deed by him, but was in those who claim under William Sears. It being thus shown that there was no seizin in fact, nor any legal title to the premises, in the defendant, it necessarily follows that the covenants of seizin and right to convey were broken, and that nothing passed to Slater and Tyson, which they could transfer to the plaintiffs as the foundation of an action in their own name. The covenant of seizin was broken at the moment of the execution of the deed, and became a mere chose in action not transferrable; and the covenant of warranty is wholly ineffectual, as no land passed to which it could be annexed; and the result, therefore, from this view of the case, is that the plaintiff cannot maintain his action.

It was said in the argument, that the defendant should be estopped to deny his seizin, and thus avoid the covenant of warranty, because by his own deed he has affirmed it, and that should be conclusive against him. Without deciding whether such estoppel might or might not, under any circumstances, be interposed where there are various covenants in a deed, and the party be thus subjected, at the election of the covenantee, to damages different from those which the law has prescribed for the covenant which is actually broken; or, in the case of an assignee, to allow him to recover for the breach of a covenant which is shown in fact never to have passed to him; it seems to us clear, that in the present case no such objection can avail, as the plaintiff, in his declaration, and by his own showing, has established the fact that the defendant had neither the seizin nor the legal title to the land conveyed.

It was further suggested, upon the argument, that the ground of defence now principally relied on, that the covenant of war-

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ranty did not pass to the plaintiffs, in consequence of the want of seizin in the defendant, is not open to the party; not having been presented in this form at the trial before the jury. As a general rule, questions must be raised at the trial, or they will not be open here; and for the very obvious reason, that the opposite party may have the proper opportunity to supply any defects in his proof upon the points excepted to. But as, in the present case, the facts, as stated in the report, and as they appear to be conceded by both parties, show the objection, now urged and relied upon in defence, to be one that could not be obviated by any further proof on the part of the plaintiff, the court have felt themselves authorized to consider that point as open, and have disposed of it in the manner already stated. The result is, therefore, that upon the case as now stated, the plaintiff cannot maintain his action.

New trial ordered

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF MIDDLESEX, OCTOBER TERM 1840, AT CAMBRIDGE.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE,
HON. SAMUEL PUTNAM,
HON. SAMUEL S. WILDE,
HON. CHARLES A. DEWEY,
} JUSTICES.

THADDEUS MUNROE *vs.* JAMES LUKE.

After one tenant in common has obtained partition by legal process, he may maintain an action of assumpsit against his former cotenant to recover his share of the rent received by such cotenant on a demise by him of the whole estate, before and during the pendency of the process for partition; although such cotenant appeared and pleaded to the petition for partition that the petitioner was not seised of said estate as tenant in common thereof.

A tenant in common of a moiety of an estate mortgaged the same after it had been attached by A.; and the mortgage was assigned to B.: A. levied execution on a fractional part of said moiety, and B. afterwards entered and took possession of the full moiety, demised the same, and received the whole rent until A. obtained partition by judgment. B. gave no notice to A. that he intended to hold the estate adversely to him: nor did he forbid A. to receive the rent: A. made no claim to any part of the rent, until after the validity of his levy was determined on his process for partition *Held*, that there was not such an actual disseizin of A. as to prevent his recovering his share of the rents, in an action of assumpsit against B.

ASSUMPSIT to recover eleven thirtieths of the rents and profits of certain real estate in Boston. The case was submitted to the court on the following facts:

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On the 15th of May, 1826, John Cooper and John Sowden owned in fee, as tenants in common in equal shares, three parcels of land in Boston. Said Cooper was a partner in the late firm of Cooper, Gould & Robbins; and on said 15th of May, the plaintiff, being a creditor of said firm, commenced an action against them, and caused said Cooper's interest in the real estate aforesaid to be attached. He recovered final judgment in said action in October, 1833, and took out execution on his said judgment, and levied the same, in due form, on the 31st of the same month, upon eleven thirtieths of one undivided moiety of the real estate aforesaid.

On the 17th of May, 1826, the said Cooper conveyed his undivided half of two of said parcels of land to Kennedy & Walsh, in fee, who at the same time gave their note to him for the whole consideration, payable in seven years without interest, and also mortgaged to him said two parcels to secure payment of said note. This mortgage was duly assigned to the defendant, by said Cooper, November 2d, 1833, and the assignment was recorded November 12th, 1833.

Whilst the aforesaid action of the plaintiff against Cooper, Gould & Robbins, was pending, said John Sowden petitioned the court of common pleas in Suffolk, to have his moiety of said real estate set off to him to hold in severalty, and partition was accordingly ordered at the January term, 1829, of said court, and was afterwards duly made. Personal notice was ordered, on this petition, and was given to Thomas Kennedy, William Walsh, and John Cooper, who, as was stated in the petition, were the only persons interested.

At the time of the plaintiff's said attachment and levy, there was an outstanding mortgage, made by said Cooper and Sowden to one Call, of one of said pieces of land, the greater part of which mortgage had, however, been paid off. The existence of this mortgage was not known to the plaintiff, and therefore not allowed for, or in any way noticed, in the levy of his said execution.

On the 12th of November, 1833, the defendant, under and by virtue of the mortgage assigned to him as aforesaid, entered and

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took possession of said Cooper's half of all the estate formerly owned in common, as aforesaid, by him and Sowden, demised the same, and continued to receive the rents and profits thereof, until partition was made, as hereinafter stated. At the time of this entry, the half entered upon was that which was left for Cooper after Sowden's moiety had been set off to him, on the partition made in pursuance of his petition aforesaid, and was held in severalty by the defendant; and it was upon a part of the half thus entered upon, that the plaintiff's execution had been levied as aforesaid.

At the April term, 1835, of the court of common pleas in Suffolk, the plaintiff presented his petition for partition of said real estate, claiming to be the owner of eleven undivided thirtieth parts of one undivided moiety thereof. The usual notice was ordered, and was given to all parties interested, by publishing said petition, and the order of court thereon, in a public newspaper. The defendant appeared as respondent, at the July term of said court, 1835, and at the following January term filed his plea, in which he denied that said Munroe was seized in common and undivided in said lands &c., in manner, &c., and tendered an issue to the country, which was joined. The case was subsequently brought to this court, and at the March term thereof, 1837, partition was ordered, according to the prayer of the plaintiff's petition. The report of the commissioners appointed to make partition was returned, and accepted by the court, June 8th, 1837.

On these facts, the parties agreed that if the plaintiff was entitled to recover, the defendant should be defaulted, and the plaintiff have judgment; otherwise, that the plaintiff should be nonsuit.

The case was argued at a former term.

Buttrick, for the plaintiff.

H. H. Fuller, for the defendant.

Shaw, C. J. This is an action of assumpsit, brought to recover of the defendant a certain proportion of the rents and profits of an estate, of which the parties respectively were tenants in common. It appears that the defendant, during the

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time mentioned, took the whole of the rents and profits, which were received in money of various tenants. The question is, whether upon the facts appearing in the case agreed, this action of assumpsit will lie.

It appears by the case, that whilst the premises in question were held as a tenant in common, by John Cooper, the plaintiff's debtor, the plaintiff made an attachment of Cooper's interest, to secure his debt, by means of which he acquired a lien on that undivided estate, which could not be defeated by the deed made by Cooper, two days after, to Kennedy & Walsh, and their mortgage back, which afterwards came to the defendant by assignment.

It further appears, that after the action had been long pending, the plaintiff recovered judgment against Cooper, and that on the 31st of October, 1833, he levied his execution on $\frac{11}{36}$th parts of the moiety, which had in the mean time been set off to the debtor, Cooper, on partition. It has heretofore been held in a process for partition by petition, between these parties, that that levy was legal, and vested an undivided interest in $\frac{11}{36}$th parts of it in the plaintiff. What was the effect of this levy, and what rights did the plaintiff acquire by it?

It has been long held, as the settled law of the Commonwealth, that the levy of an execution, pursuant to statute, vests in the creditor an actual seizin and possession, so that, from the time of delivery of seizin by the sheriff, the creditor may exercise all the rights and powers incident to acutual ownership and possession, and may maintain an action of trespass, or a real action, either against the former owner or any other person. *Langdon* v. *Potter*, 3 Mass. 215. That case seems to have been fully considered, and the opinion was delivered by *Parsons*, C. J. The creditor is treated as a purchaser for the full appraised value; he has the possession and seizin of the estate, and his title is as good as the debtor had. The seizin of the debtor is devested, and seizin is given to the creditor; and as there cannot be a concurrent seizin, the creditor alone is seized, and "the possession must be adjudged to be in him, because he has the right, and having the actual and rightful possession, he

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is immediately entitled to the profits, against the defendant." Amongst other grounds, upon which this judgment, which is very full and elaborate, is founded, is this; that in case of redemption, the creditor is to account for the rents and profits from the time of the levy, and the statute assumes throughout that he is entitled to them from that time, because he has purchased them for value. The same doctrine is held in *Gore* v. *Brazier*, 3 Mass. 523. *Wyman* v. *Brigden*, 4 Mass. 150. *Bigelow* v. *Jones*, 4 Mass. 512.

From this view of the legal effect of a levy of execution, it is manifest, that the plaintiff had a good title to the share of the rents and profits, which he claims, from October 31st, 1833, the time of his levy, to the time of the partition in 1837. It appears, that during that period, the defendant received the whole of the rents, as well the proportion belonging to the plaintiff, as his own. The question is, whether the law affords him any remedy, and if so, in what form of action.

Independent of the technical objection arising from the supposed ouster of the plaintiff by the defendant, which will be considered hereafter, it seems very clear that assumpsit will lie in this case. It has been held, that when one tenant in common has the sole occupancy of the estate held in common, no action lies by the cotenant. Each occupies *per mi et per tout*, and has a right to occupy the whole, if the cotenant does not choose to come in and occupy; and in such case, the sole occupation of one is not the exclusion of the other. *Sargent* v. *Parsons*, 12 Mass. 149. And at common law, it seems that if one had collected and received the whole or more than his share of the rents and profits of the estate, no action would lie, unless the one thus receiving had been appointed bailiff by his cotenant. Co. Lit. 172 *a*. *Wheeler* v. *Horne*, Willes, 208. But by *St.* 4 & 5 Anne, *c.* 16, it was provided, that an action of account might be brought by one joint tenant or tenant in common against the other, as bailiff, for receiving more than his just share or proportion. It has been several times held, that this statute had been adopted and practised upon as law here, prior to the adoption of the constitution, and therefore must be

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considered as the law of this Commonwealth. *Brigham* v. *Eveleth*, 9 Mass. 538. *Jones* v. *Harraden*, 9 Mass. 540, *note*. This last case was decided in 1784, immediately after the adoption of the constitution, and by judges who had been well acquainted with the practice of courts, under the provincial government. Taking this statute to be law, it precisely applies to the plaintiff's case. The statute constitutes the receiver bailiff to his cotenant, without special appointment, and all that is requisite to bring the plaintiff within it, is to allege and prove that he is tenant in common, and that his cotenant has received more than his just share of the rents. This is what the plaintiff has alleged and proved in the present case.

Supposing that an action of account would lie, and is indeed the proper and appropriate, if not the sole remedy, it is now very clear that assumpsit will lie. In the case already cited, *Brigham* v. *Eveleth*, it is stated that in consequence of the tedious proceedings in an action of account, an action of the case on a promise to account had been substituted; and that when the money had in fact been received, and the liability to account had resulted in a mere duty to pay money, *indebitatus assumpsit* well lay. This is the case where one has received in money all the profits, or more than his share. But this matter is now put beyond doubt, by the Rev. Sts. *c.* 118, § 43, by which the action of account is expressly abolished. This presupposes that by the law, as it stood before, assumpsit would lie in all cases where account would lie; and the statute proceeds further to provide, that when the nature of an account is such, that it cannot be conveniently settled in an action of assumpsit, it may be done upon a bill in equity. In the present case, it is a claim for money actually received by the defendant, to which in some form the plaintiff has title, and it therefore can be conveniently settled in an action of assumpsit.

From this view of the law, it seems very clear, that in ordinary cases, where one tenant in common has received the whole or the greater share of the rents, his cotenant may have an action of assumpsit, and that this is the appropriate if not the sole remedy at law, which he can have. Supposing this to be clear,

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then comes the other and more material question, which is, whether during the period at which these rents were received by the defendant, the relations of the parties, as litigants in regard to the title, was such as to prevent the plaintiff from having this remedy.

1. It is objected, that it is now a well settled rule of law, that after one party has recovered judgment against another in a suit at law, on his title and possession, the only remedy for the plaintiff for the rents and profits, for the intermediate time, is an action of trespass *quare clausum fregit;* and that assumpsit for use and occupation, or for money had and received for the rents, will not lie; and that this extends as well to the recovery of one tenant in common against another, as to a case between strangers. This is in general true; but we think it arises out of the artificial rules and technical principles, upon which actions of ejectment and real actions at law proceed. To prosecute an action on contract, for rents and profits, whilst the plaintiff has treated the defendant as a wrongdoer, would, as said by Mr. Justice *Ashhurst*, in *Birch* v. *Wright*, 1 T. R. 379, "be blowing both hot and cold at the same time, by treating the possession of the defendant as that of a trespasser, and that of a lawful tenant, during the same period." The difficulty, therefore, is a technical one. In the form of an action of ejectment according to the English practice, or of a real action as adopted here, the real plaintiff treats the real defendant, that is, the tenant in possession, as a disseizor, a deforciant and wrongdoer. In an action of ejectment, by the consent rule, the tenant in possession must admit the lease to the nominal plaintiff, his entry, and the ouster by the casual ejector. Ouster or disseizin always implies force; and by admission of lease, entry and ouster, the tenant in effect admits that the disseizor has turned the alleged lessee out, and taken the seizin to himself. Now although all this is mere fiction, and so understood, yet being matter of record, the parties are estopped by it. The real plaintiff cannot afterwards be received to deny, against his declaration in ejectment, that his lessee was ousted and disseized from the time of the demise laid; that he had yet a freehold or possession upon

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which he can maintain any action in form of contract, for rents and profits. Nor can the defendant, after his admission of record, deny that the casual ejector, for whom he defends, did not oust and disseize the nominal plaintiff.

So in our form of real action: The plaintiff alleges that the defendant, or some other person, disseized him or his ancestor. Now, as said by Mr. Chief Justice *Parsons*, in *Langdon* v. *Potter*, before cited, although there may be a concurrent possession, there cannot be a concurrent seizin of lands. When therefore the plaintiff alleges, as he must, that he or his ancestor was disseized, he admits in the most formal manner, of record, that from such disseizin he ceased to have any freehold or possession, and of course takes away the only ground upon which he would have a title to claim rents and profits as of right, and maintain any action for them founded on a supposed contract. Hence it has been laid down as a maxim, that after such a recovery, which restores the freehold, the plaintiff, in the form of an action of trespass, may recover not only the actual value of the rents, but the costs of the ejectment, and all costs incident to the alleged ouster and deforcement. The principles of this action were settled on great deliberation, in *Aslin* v. *Parkin*, 2 Bur. 668. It had been argued, that the plaintiff had not proved possession, and as the action was brought in the name of the nominal plaintiff in ejectment, the court must judicially know that there could be no possession. But the court there say, that the tenant is concluded by the judgment in ejectment, and cannot controvert the title, and that the possession is part of the title.

But it is quite apparent, that when this technical reason ceases, the rule ceases; and therefore the judgment concludes nothing as to the length of time the tenant in possession is liable for, or as to the value of the premises; because these facts were not in issue, in the first suit.

That the objection against an action of assumpsit for rents, or for use and occupation, or any action founded in contract, is the technical one arising from the nature of the action, and the facts admitted or proved in it, is well shown by a case before cited,

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Birch v. *Wright*, 1 T. R. 378. In this case, it was held, that after a recovery in ejectment, the plaintiff might maintain an action for use and occupation, for the time prior to the time of the demise laid in the action of ejectment, but not afterwards. And this was decided upon the reason already stated; because the judgmen in ejectment did not establish the relation of disseizor and disseizee, prior to the time of the demise laid. But a case of this sort can seldom arise, because it is now usual to lay the demise as far back as when the plaintiff's title commenced, with a view of recovering the mesne profits for the whole time not barred by the statute of limitations; and when there are doubts as to the period when the lessor's right accrued, it is customary to state different demises on different days. Adams on Ejectment, (2d. ed.) 185.

The same principle is illustrated and explained, in the case commonly cited to show that after a recovery in ejectment, one tenant in common may have trespass against another, for mesne profits. *Goodtitle* v. *Tombs*, 3 Wils. 118. The court say, that after a recovery in ejectment, by which the tenant in possession admits ouster of the plaintiff, the court will presume that the plaintiff was actually and forcibly removed and expelled from the premises, by the tenant in possession. It was, no doubt, of importance to hold as a part of English jurisprudence, that after it was established that ejectment was a proper form in which to try titles, and that, upon a recovery, an action of trespass for mesne profits was the appropriate remedy for the profits, as a consequence of the recovery in ejectment, that the uniformity of the rule and practice should not be broken in upon, by technical distinctions. And as one tenant in common may be disseized by his cotenant, by an actual and forcible expulsion, the court would, for the sake of this convenient and equitable remedy, consider the confession of lease, entry, and ouster, in ejectment by one tenant in common against another, as an admission of such actual and forcible expulsion.

2. Such being the principle upon which it is held, that trespass and not assumpsit is the proper remedy for mesne profits, after a recovery in ejectment, or in a real action; the question

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is, whether the same rule applies, after a judgment for partition in favor of the plaintiff, on a petition for partition; and we are of opinion that it does not.

In a petition for partition, the petitioner sets forth his own title to a part of the premises, but alleges no disseizin or other unlawful act on the part of the repondents, whether named or not; on the contrary, he avers that they are seized as tenants in common with him. Nor does a respondent, if he comes in and pleads, thereby admit that he has disseized or deforced the petitioner. If he plead sole seizin in himself, it is merely by way of inducement, and the fact is not traversable; and he must conclude with a traverse of the plaintiff's seizin. Otherwise the plea will be bad. *Kingston & wife, Petitioners*, 6 Dane Ab. 484. The only matters put in issue by the pleadings, made either by the respondents named in the petition or others allowed to come in, are those which draw in question the petitioner's right of partition as prayed for. And though respondents may give in evidence their own title, yet it is to rebut the title of the petitioner, and to show that he is not tenant in common, as set forth in his petition, or that he does not hold the share set forth. *Cook* v. *Allen*, 2 Mass. 462. *Loring* v. *Gay*, 9 Pick. 66. And the judgment follows the petition; it decides that the petitioner is seized and has the right of possession, as prayed for, or for such part as he shall establish his right to. The petitioner is not estopped to show his actual title, possession, and right of possession, pending the petition, by any averment that he has been disseized or deforced; nor is the respondent concluded by any admission, or by the form of the judgment, as a wrongdoer. The reason, therefore, why a plaintiff may not have assumpsit for mesne profits, after a recovery in a real action, does not exist. And when the reason fails, this rule does not apply; as in *Cummings* v. *Noyes*, 10 Mass. 433, where one entered under a judgment of law and writ of seizin, and held two years, and then the judgment was reversed; it was held that assumpsit lay for the mesne profits; and the distinction is taken between that case and the case of a demandant after a recovery in a real action, where there must have been a tortious

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entry or deforcement. In the present case, the claim which the plaintiff now makes to treat the defendant as his bailiff, and to recover upon an implied contract and statute liability, is perfectly consistent with all the averments in his petition, and all the proceedings under the process of partition, in which he claimed title to eleven thirtieths of the estate, and averred the defendant to be cotenant with him.

3. The only remaining question is, whether the facts found, independent of the judgment on the process of partition, show such an actual disseizin of the petitioner, and such exclusive seizin and possession on the part of the plaintiff, that his freehold, for the time, was defeated and turned into a mere right of entry, so that he had no title to the actual enjoyment and possession of the estate, and of course no right to take the rents and profits.

The facts upon which this question arises are these: After the plaintiff's levy, on the 31st of October, 1833, the defendant, on the 12th of November, 1833, entered upon the estate and took possession of Cooper's half of all the estate formerly owned in common by him and Sowden, rented the same, and continued to receive the rents and profits thereof, until partition was made on the plaintiff's petition. The title, under which the defendant entered, was that of a mortgage, made under these circumstances: On the 17th of May, 1826, two days after the plaintiff's attachment, Cooper conveyed his undivided moiety of the whole estate to Kennedy & Walsh in fee, and took back their note and mortgage for the whole consideration, payable in seven years, without interest; and this mortgage was assigned to Luke, the defendant, by Cooper, November 2d, 1833, two days after the plaintiff's levy.

From this statement of the conveyances and dates, it appears that Cooper conveyed to Kennedy & Walsh, subject to the plaintiff's attachment; that Kennedy & Walsh mortgaged back to Cooper, subject to the same lien; and that Cooper assigned the mortgage to the defendant, subject to the same incumbrance, it being still open to redemption, by paying the plaintiff's judgment. The right of the defendant, therefore, at the time of his

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entry, was to take and hold the estate subject to the lien and incumbrance of the plaintiff's attachment and levy. The general rule is, in the absence of any proof to repel the presumption, that when a party enters on land, having a right, his entry is intended to be, and in fact is, conformable to his right. Here he had a right to enter as mortgagee, and to hold the whole estate subject to the incumbrance of the plaintiff's levy, and to redeem and discharge that incumbrance; and there is no act or declaration qualifying his entry, to show that he intended to take any other possession, than that conformable to his right.

It is extremely difficult to determine, by any fixed rule, what constitutes a disseizin, especially between tenants in common; because in many cases a party, upon slight acts, may aver a disseizin by the tenant, for the sake of his remedy by writ of entry, in which, if the defendant contests the plaintiff's title, and pleads *nul disseizin*, he does not put in issue the fact of disseizin, but only the title; so that there is no occasion to prove the fact. *Higbee* v. *Rice*, 5 Mass. 344. In general, it is true that the acts of a disseizor, in respect to the lawful owner, are to be limited to an actual ouster and exclusive occupation by the disseizor. *Brimmer* v. *Proprietors of Long Wharf*, 5 Pick. 131. *Poignard* v. *Smith*, 8 Pick. 272.

It is stated by the court, in *Barnard* v. *Pope*, 14 Mass. 438, as to the disseizin of a cotenant, that "every dispossession does not amount to a disseizin, especially of tenants in common. For the possession of one is the possession of all, unless by an actual ouster, or an exclusive pernancy of the profits, against the will of the others, one shall manifest an intention to hold the land by wrong, rather than by the common title." And in *Cummings* v. *Wyman*, 10 Mass. 468, it was said that whether the entry of a tenant in common shall enure to the benefit of the cotenants, or be deemed an ouster of his companions, is often a question of fact depending on intent. No such intention is stated in the present case, and none is to be presumed.

In some cases it has been held that an exclusive possession by one tenant in common may be deemed adverse, so as to give effect to the statute of limitations. *Jackson* v. *Tibbits*, 9 Cow.

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241. But we think there may be such adverse possession, sufficient to give effect to the statute of limitations, which would not amount to such actual disseizin of the cotenant, as to defeat his claim to rents and profits. It seems very clear by all the authorities, that a mere silent possession, accompanied with no act which can amount to an ouster, or give notice to his cotenant that his possession is adverse, cannot be so considered. *McClung* v. *Ross*, 5 Wheat. 124. *Ricard* v. *Williams*, 7 Wheat. 121. Besides, the very fact, that the plaintiff could maintain his petition for partition, shows that he was seized; because, if actually ousted, he must have been driven to an entry or action for possession. *Liscomb* v. *Root*, 8 Pick. 376. The same case establishes the point, that as a general rule the possession of a party entering shall be construed to be according to his rights.

The facts of the present case show nothing more than that the defendant entered after the plaintiff's levy, upon the assignment of a mortgage, made after the plaintiff's attachment, and of course subject to it. It is found that he received the whole of the rents and profits, but not that he forbade the plaintiff to receive them, or that he received them contrary to the will of the plaintiff. It does not appear that the plaintiff claimed the rents and profits, or any part of them, until his claim was finally settled in the process of partition. That judgment, affirming the validity of his levy, decided that he had been actually seized, and had a lawful right of possession from the date of that levy. We think, therefore, that there was nothing in the judicial proceedings between the parties, or in their acts *in pais*, mentioned in the agreed statement of facts, which can prevent the plaintiff from maintaining this action.

We have, in this opinion, foreborne to consider whether or not an action of trespass for the mesne profits would lie in the present case, because if it would, it would not follow as a necessary consequence that assumpsit would not. But if trespass would not lie, it adds much to the strength of the reasoning in favor of an action of assumpsit; because, in that case, assumpsit for mesne profits would be a party's only remedy at law, and

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if that could not be maintained, the party would be without lega remedy.

On principle, it seems difficult to perceive how such an action could be maintained. Trespass for mesne profits is a common action of trespass *quare clausum*, in which a tortious entry must be averred and proved. But a tenant in common has a right to enter, and to occupy and take the rents and profits; and therefore something more is necessary to render his entry and occupation tortious. The plaintiff has no estoppels, no admissions of record, to rely upon, as in the case where one brings trespass after a recovery in ejectment, or in a real action. A strong doubt was expressed by *Jackson*, J. in a case somewhat similar, (*Cummings* v. *Noyes*, 10 Mass. 435,) whether trespass would lie. In *Allen* v. *Carter*, 8 Pick. 175, it was held that a constructive ouster, by an heir claiming the whole estate under a devise, will not sustain an action of trespass brought by a co-heir. There had been no recovery by the plaintiff in a real action; but a recovery had been had by another co-heir, which equally settled the question of title. It was argued in that case, that the possession of the defendant, claiming the whole estate, amounted to an ouster. The court say it may, for some purposes, as to sustain a writ of entry; but such a fictitious ouster is not sufficient to support an action of trespass. It is extremely doubtful whether, in a case like the present, an action of trespass for mesne profits could be maintained; but for the reasons already given, we think it is not necessary, in the present case, to decide that question; because whether it could or not, we think this action of assumpsit is well sustained upon the grounds stated.

Defendant defaulted

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City of Lowell *vs.* Bryan Morse & others.

An incorporated city need not sue in the name of "the inhabitants of the city," but may sue by its name of incorporation.

In a suit by "the city of Lowell" (the corporate name of the plaintiffs) on a bond, the declaration averred that the bond was made "to the plaintiffs," by the name of "the inhabitants of the city of Lowell." *Held*, on demurrer, that the declaration was sufficient, and that the plaintiffs were entitled to judgment.

Debt on a bond, in which the defendants acknowledged themselves held and bound unto the inhabitants of the city of Lowell in the sum of, &c. to be paid to William Davidson, treasurer of said city, or his successors in office. The suit was brought in the corporate name of the plaintiffs, viz., "the city of Lowell;" and the declaration averred that the bond was made to the plaintiffs by the name of the inhabitants of the city, &c. The defendants demurred to the declaration, and *Putnam*, J. overruled the demurrer, at *nisi prius*; whereupon the defendants submitted to a default, subject to the opinion of the court on these questions: *First*, whether the city of Lowell is a corporation which can sue in its corporate name. *Second*, whether the city of Lowell can maintain a suit, in said corporate name, on said bond made to "the inhabitants of the city of Lowell"

E. Fuller, for the defendants.

Wentworth, for the plaintiffs.

Dewey, J. It is objected that the plaintiffs are not properly described in the writ, the action being instituted in the name of "the city of Lowell," and not in the name of "the inhabitants of the city of Lowell." That the plaintiffs are described in the very language of their corporate name is conceded; and it would seem difficult to raise any valid objection to their use, in legal proceedings, of their legal corporate name. Such use, it is admitted by the defendants, would be correct in suits in favor of corporations generally, as banks, manufacturing corporations, and others of like character; but it is insisted that a city corporation is more limited in its objects and purposes, and is therefore more properly to be considered a *quasi* corporation, and as such, its individual inhabitants are liable to respond

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all judgments against the city, in like manner as the inhabitants of towns. It is further said that in actions in favor of town corporations, it is the immemorial usage to describe the plaintiffs by the terms, "the *inhabitants* of L——;" and we admit the correctness of this view of the matter, as to the individual liability of the inhabitants to be called upon to respond any judgment against the city, and as to the general practice alluded to, in the mode of instituting suits in favor of towns. How this form of describing the party in such cases originated, or whether it ever received any direct judicial sanction, we are not apprized; but we certainly do not mean to suggest any doubt of its correctness. Probably it found its precedent in the forms used in England in suits against hundreds. By a recurrence to the earlier books of entries, it will be seen that in such cases the usual form, in which the party is described, is that of "the men inhabiting in the hundred," or "the men inhabitants of the hundred." Levinz Ent. 21. Vidian's Ent. 210. 2 Saund. 374. 1 Lil. Ent. 295. See also 7 Went. Plead. 233. Fitzg. 296.

But this form of description of the party has not with us uniformly been adopted in respect to corporations, whose members are held individually liable to respond judgments rendered against the corporation. The case of parishes is an instance of this class; yet the practice has more generally been to use the corporate name of the parish, and not the description, "the inhabitants of the parish, &c." Both forms have been used, and without any exceptions to them. A mode similar to that adopted in the present case has become somewhat familiar to us, in the various actions that have been instituted by the city of Boston No question has thus far been made as to the form in those cases. And in the case of a town corporation, where an objection was taken to an indictment, that the defendants were improperly described, being named as "the town of D——," it was held that the party was rightly named. *Commonwealth* v. *Dedham*, 16 Mass. 141.

The court do not perceive any legal objection to the description of the plaintiffs in the present suit, and are of opinion, that

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the corporate name of the city may be properly taken to be the name in which it may institute suits at law.

The further objection is also made, that the plaintiffs cannot recover, because the bond, upon which this action is brought, is one in which the obligors acknowledged themselves held and bound to "the *inhabitants* of the city of Lowell," but the suit is instituted by "the city of Lowell," and is therefore liable to the objection of variance between the *allegata* and the *probata*. Upon referring to the declaration, it will be seen that the obligation is truly set forth according to the precise form shown by the evidence, but with the further averment, that it was made to the plaintiffs, as obligees, by the name and style of "the inhabitants of the city of Lowell." To this declaration the defendants originally demurred, and thereby admitted all the facts well set forth in the pleadings, and thus confessed that the plaintiffs were in truth the obligees, under the name and style of the inhabitants of the city of Lowell; and upon this demurrer, the judge at *nisi prius* ruled in favor of the plaintiffs. And upon the question now presented, whether "the city of Lowell" can maintain a suit in their corporate name, upon a bond given to "the inhabitants of the city of Lowell," the declaration containing the proper averment alleging the bond to be made to the plaintiffs, and the facts alleged being taken as true, the court are of opinion that the action may be maintained in its present form. The promise, in such a case, may well be declared on according to its legal import and effect. It is only necessary to ascertain the party to whom the promise was really made. This, by the pleadings and facts conceded, is made certain. And being so, the misdescription, in the bond, of the corporate name of the plaintiffs, is no objection to their right to recover thereon. *Medway Cotton Manufactory* v. *Adams*, 10 Mass. 360, and *Commercial Bank* v. *French*, 21 Pick. 486, cited by the plaintiffs' counsel, are cases directly bearing upon this point, and are well sustained by numerous authorities therein referred to. (See *ante*, 359)

Judgment for the plaintiffs.

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Richard Strong *vs.* Dinsmore Smith & Trustee.

Where an administrator, who has in his hands a distributive share of an estate which accrued to a married woman, is summoned as trustee, in an action against her husband, he will be discharged if the husband die while the action is pending; as the wife's right of survivorship is not devested, in such case, until judgment.

By the answer of C. Butler, who was summoned as trustee in this case, it appeared that he was administrator of the estate of John Burgess, and had been ordered, by the judge of probate, to pay $56 to Elizabeth Smith, widow of said Dinsmore Smith, the principal defendant, as her distributive share in the estate of said Burgess — the said Dinsmore having died since this action was commenced.

Farley and *B. Russell*, for the plaintiff, cited *Hayward* v. *Hayward*, 20 Pick. 528. *Wheeler* v. *Bowen*, 20 Pick. 567.

Buttrick, for the trustee.

Shaw, C. J. The object of this suit is to charge Butler as trustee, as the administrator of the estate of John Burgess, the father of Mrs. Smith, wife of the principal defendant. By the Rev. Sts. c. 109, § 62, the distributive share of an heir at law may be attached by summoning the administrator as trustee. And we formerly decided, in this case, that as the distributive share of the wife was a chose in action, which the husband might reduce to possession for his own benefit, so a creditor of the husband might do the same thing. The trustee process operates as a species of compulsory statute assignment, by which a creditor may obtain that by operation of law, which his debtor might voluntarily assign to him, in payment of his debt. *Wheeler* v. *Bowen*, 20 Pick. 563.

It now appears by the further answer of the trustee, that Smith, the principal defendant, and husband of the distributee, has deceased, during the pendency of this action; and the question now is, whether the trustee can be charged. The court are of opinion, that the distributive share of the wife, which was a chose in action that accrued during the coverture, survives to the wife, unless reduced to possession by the husband during his lifetime; *Hayward* v. *Hayward*, 20 Pick. 517; and that not

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ing short of a judgment will amount to such reduction to possession as to bar the wife's right of survivorship. Clancy Husb. & Wife, 113. We think also that the creditor of the husband has no higher or better right, than he himself had; and that the attachment created a lien only, and did not devest the wife's right of survivorship, in the event of the death of the husband before judgment.

Trustee discharged.

FRANCIS K. DUDLEY *vs.* INHABITANTS OF WESTON.

In an action against a town to recover damages sustained by reason of a defect in a road, reports of committees appointed by the town to inquire into the facts of the case, and votes of the town accepting such reports, are not admissible in evidence against the town, if such reports do not set forth facts which show the liability of the town, and if such votes neither acknowledge any liability, nor direct any settlement with the plaintiff at the town's expense.

THIS was an action on the Rev. Sts. *c.* 25, § 22, to recover double damages for an injury received in the plaintiff's person by reason of a defect in a highway which the defendants were by law obliged to repair. The plaintiff alleged, in his declaration, that he was riding in a wagon, and that by means of a defect in the highway, he was thrown out, and thereby one of his legs was broken, &c.

At the trial before the chief justice, the alleged injury was proved or admitted; but the defendants denied that the highway was defective, and also undertook to prove that the injury was caused by the plaintiff's carelessness and negligence. Much evidence, on both sides, was given on these two points of defence, and the jury found a verdict for the defendants. The plaintiff moved for a new trial, on the ground of the rejection of evidence offered by him; viz. copies, from the records of the town of Weston, of the reports of committees and votes of the town, which are hereinafter mentioned.

On the 10th of November, 1834, the defendants voted that the selectmen be a committee to inquire into the circumstances

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relating to the accident by which the plaintiff had his leg broken, and make a report thereon at the town meeting in March 1835 At that meeting the selectmen made a report, and the subject, by vote of the town, was recommitted to them, with directions that they should report again at the next May meeting. The selectmen, at the May meeting, reported that the plaintiff, on the 15th of July, 1833, was riding in a large chair or couch, placed in the bottom of a light wagon, and when within a few rods of h s house, the wagon wheel struck a stone in the road, and the plaintiff, together with the chair, was suddenly thrown to the ground, but the wagon was not upset; that they had examined the wagon, the chair and the stone, and that, in their opinion, all the circumstances did not render it absolutely certain that the town was liable for damages; but that the plaintiff had a just and equitable claim on the friends of humanity, which ought not to pass unnoticed. After setting forth the condition and character of the plaintiff, his sufferings, and the expenses necessarily attending the injury he had received, the selectmen declared their opinion that something could and ought to be done to meliorate the plaintiff's condition, and to effect a peaceable adjustment of the whole affair, and concluded their report thus: "Your committee have drawn up a subscription, which is herewith presented, and would recommend that a committee, consisting of one person from each school district, be appointed to collect subscriptions for him; and we appeal to every individual in the town," &c. The town thereupon "voted that the report be accepted," and appointed a committee accordingly to procure subscriptions for the plaintiff's relief.

By a vote of the town, passed May 2d, 1836, the chairman of the committee last abovementioned was directed to ascertain what sums had been or might be collected by them, and that they pay over the amount to the plaintiff, "on condition tha: he relinquish all claims against the town for injuries sustained."

At a town meeting, March 6th, 1837, a committee was appointed, by vote, to confer with the plaintiff on the subject of his claim for damages, and was directed to make a report at the

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next meeting. On the 1st of May following, this committee reported that the plaintiff demanded of the town $1000, as damages, or would "leave it with three men, to be chosen, one by the committee, one by himself, and one by the two first, to say what compensation, if any, he shall receive." Whereupon the town "voted to accept the report of the committee appointed to confer with F. K. Dudley, and to have no further action on the subject."

New trial to be granted, if the foregoing reports and votes, or either of them, ought to have been admitted in evidence for the plaintiff.

Mellen, for the plaintiff.

S. Hoar, for the defendants.

WILDE, J. At the trial of this case, the plaintiff offered in evidence copies, from the records of the town of Weston, of certain reports of committees, and votes of the town, on the subject of the controversy between the parties, which were deemed by the court not material and pertinent to the case; and they were accordingly rejected. The object of the town, as disclosed by these votes and the reports of the committees, appears to have been to ascertain the facts in relation to the plaintiff's complaint, and to compromise with him, to avoid an action. But it does not appear that there has been, expressly or impliedly, any admission of the liability of the town, or of any fact material to the issue. There has been no offer to pay the plaintiff any money belonging to the town. The money offered was collected from individuals, by subscriptions. It is true that the town appointed a committee to procure subscriptions; but this was upon the recommendation of a former committee, on the assumption that the town was not legally liable If, however, the money had belonged to the town, the offer to pay it was made with a view to a compromise, and the proof of such an offer would be inadmissible. Bul. N. P. 236. *Marsh* v. *Gold*, 2 Pick. 285. *Gerrish* v. *Sweetser*, 4 Pick. 374.

The acceptance of the reports of the committees was no admission of the facts reported. In accepting the first report, the town agreed to the measure recommended by the committee;

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but there was no admission of the facts stated in that report. The other report of the committee was also accepted; but the vote was to accept the report, "and to have no further action on the subject" — which shows that by *accepting* the report, the town intended nothing more than *receiving* the same; otherwise, if the word "accept" is to be understood in the sense of the word "agree," the latter vote would be repugnant. We think it, therefore, beyond doubt that the word "accept" was not used in that sense in the latter vote; and we must presume that the word was understood in the same sense in both votes.

Judgment on the verdict.

FRANCIS JARVIS *vs.* JOHN BUTTRICK.

B., by his will, gave to his wife, in common with his daughter, the use of certain rooms in a house, and also gave to his daughter, in common with his wife, the use of the same rooms; which use the daughter was to have so long as she should remain unmarried. *Held*, that after the death of the wife, the daughter, remaining unmarried, was entitled to the sole use of the rooms.

In a deed conveying real estate, the grantor, after a description thereof, added that it was sold subject to the right of the widow and daughter of B. in the same — the daughter's "right to exist no longer than the widow occupies the premises to which she is entitled under said B.'s will" — and covenanted that the premises were free from all incumbrances except the above mentioned. By the will of B., the daughter had a right after the widow's death, in the estate conveyed. *Held*, that the grantor was liable to the grantee, in an action on the covenant against incumbrances.

COVENANT BROKEN. The parties submitted the case to the court upon the following facts: In April, 1825, John Buttrick, the father of the defendant, being the owner of a certain farm in Concord, on which he then lived, made his will, in which, among other things, were the following provisions for Hannah, his wife, and Emeline, his daughter, viz. "I also give to my said wife, in common with my daughter Emeline, the use of the northeasterly room, bed-room and chamber, in my dwellinghouse where I now live, with the privilege of using the kitchen and cellar in said house, in common with the persons, whoever they may be, who

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occupy the other part of said house. I also give to my daughter Emeline aforesaid the use, in common with my said wife, of the northeasterly room, bed-room and chamber, and such use as she may need, in common with the other occupants of the house, of the kitchen and cellar in my dwellinghouse where I now live; which use the said Emeline may have and enjoy so long as she remains unmarried."

Said testator died in September, 1825, and said will was afterwards, in the same year, duly proved, and allowed by the judge of probate for this county.

On the 15th of March, 1832, the defendant duly made and executed a deed conveying said farm and house to the plaintiff. After a description of the land, by its boundaries, &c. said deed contained these words: "The said premises being sold subject to the right which Mrs. Hannah Buttrick and Miss Emeline Buttrick, the widow and daughter of the late Colonel John Buttrick, deceased, have in the same. Said Hannah's right is only during her widowhood, and said Emeline's right to exist no longer than said Hannah occupies the part of the premises to which she is entitled under said Colonel John Buttrick's will."

The defendant covenanted, in said deed, that the premises were "free from all incumbrances, except the abovenamed have in the same," and that he would warrant and defend the same to the plaintiff, his heirs, &c. against the lawful claims, &c. of all persons, "except the claims of the abovenamed."

After the death of said testator, his widow, and his daughter Emeline, by virtue of said will, entered into and occupied the part of the house abovenamed, until the death of said widow on the 1st of June, 1839. Said Emeline, being above the age of twenty-one years, and never having been married, has continued to occupy said part of said house, since said 1st of June, claiming a right so to do, by virtue of said will, and has refused to give up the possession to the plaintiff.

Judgment to be rendered for the plaintiff, if there has been a breach of the covenants in the defendant's said deed; and damages to be assessed in such way as the court may direct.

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Keyes, for the plaintiff, cited 3 Dane Ab. 574, *et seq.* *Thayer* v. *Clemence*, 22 Pick. 490.

Buttrick, for the defendant, cited *Sprague* v. *Snow*, 4 Pick. 54. 2 Saund. 96 *b.* *note* (1). 3 Dane Ab. 583. *Powell* v. *Clark*, 5 Mass. 357. *Tempany* v. *Burnand*, 4 Campb. 21. *Howell* v. *Richards*, 11 East, 640. *Wilson* v. *Smith*, 7 T. R. 216, *note*.

WILDE, J. This was an action of covenant brought for the alleged breach of the covenant against incumbrances, contained in a deed of conveyance of real estate, from the defendant to the plaintiff. By the granting part of the deed, it appears tha the estate was "sold subject to the right which Hannah Buttrick, and Emeline Buttrick, the widow and daughter of the late John Buttrick, deceased, have in the same: Said Hannah's right is only during her widowhood, and said Emeline's right to exist no longer than said Hannah occupies the part of the premises, to which she is entitled under said John Buttrick's will." Among other covenants, the defendant covenanted that the granted premises were "free from all incumbrances except the abovenamed have in the same." The breach alleged is, that the said Hannah died on the first day of June, 1839, and that the said Emeline has ever since that time continued to occupy the part of the house on said granted premises, which was given her by the said John Buttrick's will; and that she had a right so to occupy it. By the will it appears that the use of certain parts of the house was given to the said Emeline, in common with the said Hannah, "which use the said Emeline may have and enjoy, so long as she remains unmarried." It being agreed that the said Emeline still remains unmarried, we think it very clear, that she is entitled to the use of that part of the house which was given her by the will.

It was argued for the defendant, that Emeline had no right to the use and occupation except in common with her mother, the said Hannah. But such a construction is inadmissible. It is repugnant to the express words of the will, which defines and limits the use. The prior words of the will, which gave to the said Emeline the use and privileges in the house, in common

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with the said Hannah, were intended to limit her right during the said Hannah's life; and the limitation ceased on her death.

Then it was argued, that the defendant did not covenant that the right of the said Emeline was limited to the life of the said Hannah: That the words of the will, on which the plaintiff relies, are words of description and do not amount to a covenant. But there is an express covenant, that the granted premises were free from all incumbrances except those which the abovenamed had in the same. Those incumbrances and claims had been limited in the description of the estate conveyed, and were unquestionably referred to as there described. To give the true construction of any clause in a deed, other parts of the deed are to be considered, in order to ascertain the intention of the parties; and taking all parts of the deed into consideration, we can have no doubt of the true meaning of the covenant against incumbrances. It is a covenant against all incumbrances, except those which were excepted and defined in the description of the estate conveyed.

Judgment for the plaintiff.

WILLARD ADAMS *vs.* DAVID TOWNSEND, Administrator.

Part performance of an oral contract for the sale of lands, &c., does not take such contract out of the operation of the statute of frauds.

ASSUMPSIT on a special agreement made by the defendant's intestate with the plaintiff.

From the report of the chief justice, before whom the case was tried, it appeared that in the year 1833, the plaintiff and said intestate were owners, respectively, of land in Waltham, bounding on opposite sides of a town road. An alteration of the course of said road was proposed, by taking 15 feet of the plaintiff's land, on one side thereof, whereby a like quantity could be added to the intestate's land on the other side, by discontinuing the road over and adjoining his land to the same extent. Whereupon it was agreed, orally, between the plaintiff

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and the intestate, that if the plaintiff would consent to said alteration, by which so much of his land would be taken, without claim for damage, the intestate would convey to him an equa quantity of his (the intestate's) land adjoining the plaintiff's other land. In pursuance of this agreement, the parties thereto, and others, joined in a petition to the selectmen of Waltham, to alter said road; and upon a representation that the alteration could be made without cost to the town, and would accommodate the parties, and in some degree improve and better the road, it was laid out and established accordingly.

It was proved by the testimony of all the said selectmen, and by other evidence, that the parties made the agreement aforesaid, and that it was executed on the part of the plaintiff, by consenting to the taking of his land, without claim of damages. It was also proved that the plaintiff demanded of the intestate a deed, which he neglected to execute.

It was objected, that the plaintiff could not recover on an oral contract for the conveyance of land, such contract being void by the statute of frauds; and that the evidence above stated was not competent. But the objection was overruled, for the purpose of bringing the question before the whole court, whether a part performance of such oral agreement takes a case out of the operation of said statute.

Other grounds of defence were taken and argued, which became immaterial to the decision of the cause, and are therefore omitted.

Whiting, for the defendant, cited *Kidder* v. *Hunt*, 1 Pick. 328. *Thompson* v. *Gould*, 20 Pick. 138. Chit. Con. (Perkins's ed.) 241, *& note*.

Farley and *Brad Moore*, for the plaintiff, cited *Goodwin* v. *Gilbert*, 9 Mass. 510. *Davenport* v. *Mason*, 15 Mass. 93. *Noyes* v. *Chapin*, 6 Wend. 461. *George* v. *Bartoner*, 7 Watts, 530. *Little* v. *Martin*, 3 Wend. 219.

Dewey, J. The contract, upon which the plaintiff seeks to recover in the present action, is a parol promise to convey an interest in land, and is clearly within the provisions of the then existing statute of frauds, *St.* 1783, *c.* 37, § 2, and the Rev

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Sts. c. 74, § 1. But it is contended, that although an action could not have been maintained on this agreement, if it had remained merely executory, and in no part performed by either party, yet that under the circumstances which attend this case, it may be now enforced, upon the ground that part performance of such an agreement takes the case out of the operation of the statute. Such a doctrine has, under proper limitations, often been recognized in the courts of equity, where it was required in furtherance of justice and to prevent manifest fraud; but it has obtained no permanent sanction as a principle of jurisprudence in the courts of law. It was repudiated by this court, as early as the case of *Sherburne* v. *Fuller*, 5 Mass. 138, and in the subsequent cases of *Kidder* v. *Hunt*, 1 Pick. 328; *Griswold* v. *Messenger*, 6 Pick. 517; and *Thompson* v. *Gould*, 20 Pick. 134. A similar rule has prevailed in the courts of New York; *Jackson* v. *Pierce*, 2 Johns. 223; and in the courts of Maine. *Freeport* v. *Bartol*, 3 Greenl. 340. *Norton* v. *Preston*, 3 Shepley, 14. In the English courts, a similar doctrine was held in *Rondeau* v. *Wyatt*, 2 H. B. 63, and *Cooth* v. *Jackson*, 6 Ves. 12; Lord *Eldon*, in the case last cited, holding a different view of the law on the subject, from that which had been intimated in the earlier case of *Brodie* v. *St. Paul*, 1 Ves. Jr. 326.

Several of the cases above cited will be found to have presented strong equitable claims for the interposition of the court, and to have been cases where the defendants had received benefit, to a very considerable extent, from the execution of the contract by the plaintiffs; but the court nevertheless maintained the doctrine, that damages could not be given at law for the non-performance of a contract to convey lands, which was not in writing; and that it would not avail, though a part performance was shown, even if it appeared that the party was remediless, if he could not resort to his action. The statute is plain and direct in its terms, and it is the misfortune of the party, for which this court can give no relief, if he has failed to acquire the evidence which the law makes necessary to enforce his contract, or to authorize a recovery in damages for the breach of it.

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The case of *Davenport* v. *Mason*, 15 Mass. 85, has been sometimes supposed to sustain a different doctrine upon this subject. But it will be found that the remarks of the court, having that bearing, are mere *obiter dicta*. That case was decided upon other sufficient grounds, and has not been understood by the court as an authority for sustaining the principle contended for by the present plaintiff. Several more recent decisions by this court, in the cases already cited, are certainly clearly adverse to such a view of the law on this subject.

The contract, relied upon by the plaintiff, being thus within the statute of frauds, he has established no legal right of action, and must therefore become nonsuit.

BURRAGE YALE *vs.* JOSHUA N. EAMES & another.

Under an authority, though by parol only, given to one partner by the others, after a dissolution of the partnership, to sell a negotiable note made to the firm before dissolution, he may indorse such note, "without recourse," in the name of the firm.

ASSUMPSIT by an indorsee against the makers of a promissory note. The facts of the case appear in the opinion of the court.

S. Hoar and *L. Williams*, for the plaintiff, cited *Murray* v. *Mumford*, 6 Cow. 441. *Smith* v. *Winter*, 4 Mees. & Welsb. 454. *Valentine* v. *Piper*, 22 Pick. 92.

Buttrick, for the defendants, cited 1 Campb. 281, *note* (b.) *Abel* v. *Sutton*, 3 Esp. R. 108. *Foltz* v. *Pourie*, 2 Desaus. 40. *Sanford* v. *Mickles*, 4 Johns. 224. *Ramsbotham* v. *Cator*, 1 Stark. R. 228.

SHAW, C. J. The case upon the facts stands thus: During the existence of the firm of Gay & Bird, the note now in suit was made payable to the firm, or their order, by their partnership name. It so stood when they dissolved. After the dissolution, both partners occupied the same counting-room, and had access to the books and papers of the late firm. Application was made to one, in the absence of the other, to purchase this note, and a price was offered. The party applied to consulted

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with his partner, and he consented to the sale of it upon the terms proposed, but nothing was said about indorsing it. In pursuance of this assent, the partner first applied to, on receipt of the stipulated price, indorsed the note to the plaintiff, in the name of the late firm, "without recourse." It is contended that this indorsement did not vest such legal title in the plaintiff as to enable him to maintain an action in his own name.

It is undoubtedly a general rule of law, that after dissolution, one partner cannot indorse negotiable instruments, so as to bind the other partner. *Sanford* v. *Mickles*, 4 Johns. 224. The rule was established mainly with a view to secure the firm against any new engagements, to be entered into by one of the partners after dissolution. *Abel* v. *Sutton*, 3 Esp. R. 108. But though the beneficial interest in all property and choses in action becomes several by dissolution, yet to many purposes the legal title remains joint, until an actual collection of the debt or disposal of the property. If one die, the whole legal title vests, by survivorship, in the other; and a suit must be brought in his own name, without joining the representatives of the deceased. *Murray* v. *Mumford*, 6 Cow. 441. But the rule, as before stated, is made for the protection of partners after dissolution. During the continuance of the partnership, partners have an unlimited power to bind each other by negotiable and other contracts. This power is *de facto* revoked by a dissolution. But they may waive a rule made for their benefit; and therefore if they consent to a limited continuance of the partnership, or to specific acts in the partnership name, they are bound thereby. And this authority or consent may be given by parol. *Smith* v. *Winter*, 4 Mees. & Welsb. 454. We think this rule renders the indorsement in this case valid. After dissolution, both partners agreed that a note, payable to them, as partners, or their order, for a valuable consideration, should be sold and transferred to another; and one of them afterwards received the price, and indorsed the note, "without recourse," thereby excluding the responsibility of the payees, as indorsers. Though nothing was said about indorsement, the court are of opinion, that an authority to sell for a valuable consideration carries with it, as incident, an

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authority to make such title, as the vendors have the power of making, to the vendee, without any new stipulations contrary to the terms of sale and the intention of the parties. It comes within the reason and spirit of the rule, that an authority to sell real estate vests the attorney with power to execute such deeds as will effectually vest the estate in the vendee, entering into no new or special covenants. *Valentine* v. *Piper*, 22 Pick. 92. The indorsement, in the present case, precisely conformed to these conditions; it vested the legal title in the vendee, without creating any new obligation upon the indorsers. It is therefore an indorsement by one partner in the name of the firm, with the consent and authority of the other. It is the legal act of both, and transferred the legal title and interest in the note to the plaintiff.

Judgment for the plaintiff.

ALVAH MANSUR *vs.* SAMUEL L. WILKINS.

Under the Rev. Sts. *c.* 35, § 2, a plaintiff, who recovers only the balance of his claim, after a deduction of the forfeiture incurred by him for reserving or taking usurious interest thereon, is not entitled to costs; and a judgment, in such case, for his damage and costs, is erroneous, and will be reversed as to the costs.

WRIT OF ERROR. The opinion of the court exhibits the whole case.

SHAW, C. J. The object of this writ of error is to reverse a judgment rendered in this court, at October term 1838, in favor of the defendant in error against the plaintiff in error. By the record it appears that the original plaintiff sued on a promissory note; that it was found by the jury that certain usurious interest had been reserved or taken, and a corresponding deduction, by way of forfeiture, was made from the amount of the note; and that the plaintiff had judgment for the balance, conformably to the Rev. Sts. *c.* 35, § 2. It further appears, that the plaintiff had judgment for his costs, and the defendant also for his costs. The error assigned and now insisted on is, that judgment was given for the plaintiff for costs. The provision

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of the statute, in such case, is, that the plaintiff shall forfeit, &c. "and shall have judgment for the balance only, which shall remain," &c. Taking the language of the statute in connexion with its obvious intent and purpose, we think it was not the intention of the legislature to give costs to the plaintiff. He can hardly be said to be the prevailing party. The defence succeeds to the full extent, to which the law gives it; and by the express words of the statute, the defendant shall recover his full costs. Then when the words are added, that the plaintiff "shall have judgment for the balance only," we think they were intended to declare, that he should have no other or further beneficial judgment; and therefore that the judgment for costs was erroneous. But as the two parts of the judgment are entirely distinct, so that it may be affirmed in part and reversed in part, the judgment of the court is, that that part of the said judgment, which awarded costs for the plaintiff, be reversed; and in other respects, that the judgment be affirmed.

Wentworth, for the plaintiff in error.

Knowles, for the defendant in error.

Sylvanus Wood *vs.* Inhabitants of Burlington.

W. agreed with a town "to support all the town and state paupers, who have or shall have their legal settlement in said town, for and during the term of five years; to pay all funeral expenses of said paupers, and be at all the expense of transporting and removing; and to pay all other expenses whatever, that may arise concerning the expense of said paupers, except that of ascertaining their legal settlement."

Held, that W. was bound to pay the expense incurred by the town for the support, in the house of correction in the city of Boston, of a person whose legal settlement was in said town. *Held* also, that W. was bound to pay the costs incurred by the town, in a suit by the city of Boston to recover for the support of such person; the town having given W. notice of the claim of said city.

Assumpsit to recover the sum of $121·09. The case was submitted to the court upon the following facts:

On the 20th of March, 1833, the plaintiff executed a bond to the defendants, in the penal sum of $3000, with this condition, viz. "if the said Wood, shall support all the town and

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state paupers, (excepting one Venus Roe,) who have or shall have their legal settlement in said town, during the term of five years, from and after the first day of April next, to the acceptance of the overseers of the poor of said town for the time being; shall pay all funeral expenses of said paupers, and all expenses of transporting and removing, and pay all other expenses whatever, except that of ascertaining their legal settlement, then this bond to be void, otherwise to remain in full force." For the performance of this condition, the defendants engaged to pay the plaintiff $500 *per annum*.

Ruth Patio, a healthy, able-bodied, single woman, and of about middle age, had her legal settlement in the town of Burlington. From the 1st of January, 1836, to the 2d of May, 1838, said town paid to the city of Boston a sum amounting, with interest, from the times of payment to the last mentioned day, to $115·13, for the support of said Ruth in the house of correction in said city, where she had been committed for offences, at different times during the above period. The defendants were served with due notice of the commitments of said Ruth, and gave due notice thereof to the plaintiff. The defendants also paid the city of Boston the further sum of $5·96, costs of suit on the first bill which the city presented to them for the support of said Ruth, as aforesaid, which bill said city sued, on the defendants' neglect to pay; and the defendants settled the same, before the return day of the writ; having, before the bill was put in suit, duly given notice to the plaintiff that the same was presented to them for payment.

The town deducted and retained the above sums of $115·13, and $5·96, from the amount due to the plaintiff under their said engagement; insisting that, by the terms of the condition of said bond, he was liable to pay them said sums.

The plaintiff performed the condition of his said bond, to the acceptance of the overseers of the poor of the town, except in the matter of Ruth Patio, as above set forth, and kept and supported town and state paupers on a farm in Burlington, where he had full employment for all of them.

The town, at several legal meetings, voted to pay the plaintiff

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the sum demanded by him in this suit; and at several other meetings, voted to reconsider and annul their former votes on this subject.

It was agreed by the parties, that the plaintiff should become nonsuit, or that judgment should be rendered for the plaintiff for such sum as the court should direct, according to the opinion of the court on the foregoing facts.

J. Dana, for the plaintiff.

Farley, for the defendants.

Shaw, C. J. The plaintiff entered into a contract with the defendant town, to support the poor of the town, and pay all expenses incident thereto, with certain exceptions, for the term of five years; and the question in this case arises upon the construction of that contract. During the term, the town were called upon, by the city of Boston, to reimburse expenses incurred by the city, for the support of one Ruth Patio in the house of correction. It appears, that she had her legal settlement in the town of Burlington, that she was committed to the house of correction, and by force of the statute of 1826, *c.* 142, the town was compellable to pay; and, after demand made, and suit commenced, and notice given to the plaintiff, who declined paying, the town did pay the sum in question, and deducted it from the sum due by contract to the plaintiff.

The plaintiff contends, that Ruth Patio was not a pauper, within the terms of his contract, but was a convict; that being an able-bodied and healthy single woman, she did not require aid of the public for her support; and that his contract manifestly looked to the support of the poor, on his own farm in Burlington, and not in distant places; and that if Ruth Patio had asked for assistance in the town of her settlement, her labor might have compensated the plaintiff for her support.

It is not easy to ascertain from the contract, whether the parties had exactly such a case as the present in their minds, or not. If they used terms which include it, it must be taken to be their contract, and their language must be construed according to common and popular usage.

The agreement is set forth, in the recital which precedes the

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condition of the plaintiff's bond, thus; "said Wood has agreed with the said inhabitants of Burlington, to support all the town and state paupers" (excepting one named) "who have or shall have their legal settlement in said town, for and during the term of five years, &c. to the acceptance of the overseers; to pay all funeral expenses of said paupers, and to be at all the expense of transporting and removing, and to pay all other expenses whatever, that may arise concerning the expense of said paupers, excepting that of ascertaining their legal settlement." The same agreement is repeated in nearly the same terms, in the condition of the bond.

It is obvious, in the first place, that this agreement cannot be construed literally; because it is contradictory to itself. It is "town and state paupers, having their legal settlement," &c. A state pauper cannot have a legal settlement in any town; one who has such settlement is not a state pauper. Some construction, therefore, must be put on this clause, different from the literal meaning. It is clear, we think, that there is nothing in the contract, whatever might have been in the expectation of the parties, to limit the responsibility of the plaintiff to those who were to be supported on the plaintiff's farm, or in Burlington. It provides that he shall be at the expense of removal, and pay all other expenses whatever, concerning such paupers, except that of ascertaining their legal settlement. It seems quite clear, that the plaintiff was to support some state paupers; but who were they? The contract says, those having their legal settlement: That is impossible; there are none such. There seems no reasonable construction but this — those state paupers, whom the town, in the first instance, would be bound by law to relieve. And this, no doubt, is what the parties understood by the contract, and acted on as such. It is manifest, therefore, that this contract was not expressed with strict legal accuracy.

What did these parties understand by paupers? We think they intended generally those persons, whom by law the town was bound to support or relieve, by the operation of general laws. By the statute of 1826, *c.* 142, every town, under certain limitations, was bound to pay for the support of convicts in

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any house of correction, who had their legal settlement in such town. Though they are confined as convicts, they are supported as paupers. Their expenses are charged upon a distant town, not because such town is in any degree responsible for their crimes, but solely because it is bound to support them, when from any cause, be it age, sickness, imbecility or confinement, they are unable to support themselves. An expression is relied upon, in the opinion of the court in *Boston* v *Westford*, 12 Pick. 21. It was there said of persons so confined, "the defendants could not proceed to remove them. They were not kept and supported as paupers in distress, standing in need of immediate relief, but as criminals and convicts." These expressions were correct, taken in connexion with the subject matter, and the case to which they were applied. The question was, whether the city of Boston had complied with the directions of law, in having their account audited, and giving notice thereof, and making a demand fourteen days before suit brought, as the prerequisites to the bringing of an action. What the court there say was, that they were not mere paupers or common paupers, who could be removed on notice, but they were to be supported in a particular manner, and the statute pointed out how the town of their legal settlement should be charged; and if such course was not followed, the condition precedent was not performed, and no action would lie. The construction we adopt, therefore, is not in opposition to the case cited. Nor is it, we conceive, inconsistent with the definition or description of "paupers," as given in an opinion of this court, to the Honorable Senate, 11 Pick. 540; though that opinion turned upon the technical meaning of the word "paupers," as used in the constitution. They are designated as "persons receiving aid and assistance from the public, under the provisions made by law, for the support and maintenance of the poor." Persons thus confined in houses of correction are supported as paupers. The responsibility is cast upon those who would be liable for their support, in case of being reduced to want by sickness, or any other cause; those who would be liable by law for their support, "if a pauper," or by the town or city where

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such person shall have a legal settlement. The latter expression has direct reference to the poor laws, and derives it meaning from them.

It appears that Ruth Patio had her legal settlement in Burlington, and that town was by law liable to her support. Her health and strength could not avail her, when placed by law in close confinement, where she could not earn a subsistence. The city were by law to support her, in the first instance, because she stood in immediate need of relief there, and the town were bound to reimburse them, because, under the poor laws, her settlement was there. The law regarded her, for the time being, as a pauper. We think, that by the terms of this contract, the plaintiff was bound to meet this expense, and generally to pay all the other expenses which the town might incur for the support and maintenance of their poor.

In regard to the costs of suit, paid by the town, we think that this sum must follow the principal. The town gave the plaintiff notice of the claim, and of the demand made upon them; it was his duty to pay the amount within the time limited by law, and they had a right to presume that he would do it. If he had so done, the expense would not have been incurred. This expense was a consequence of his own default, and he cannot cast it on the town.

We think there was nothing in the conflicting and contradictory votes of the town, which was sufficient to render them liable, when, as it now appears, they were not liable by their contract.

Plaintiff nonsuit.

JOHN WELCH *vs.* CHARLES J. ADAMS.

The tenant of a mortgagor is not liable to him for rent that accrues after the mortgagee has entered and required that the rent shall be paid to himself, and the tenant has agreed to pay him; although the mortgagee's entry may not be effectual for the purpose of foreclosure.

ASSUMPSIT for the use and occupation of a tenement during the months of September and October, 1838.

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The defendant occupied the tenement during those months, and, before the commencement of this action, tendered to the plaintiff sufficient to pay for such occupation until the 3d of September.

The tenement was mortgaged by a former owner thereof, before it was conveyed to the plaintiff. On the 3d of September, 1838, George Holden, assignee of the mortgage, made open and peaceable entry upon the mortgaged premises for the purpose of foreclosing the mortgage, and of receiving the rents and profits. The defendant consented to said entry, but the plaintiff was not present when it was made. Said Holden required the defendant to pay the rent to him, from the time of the entry, and the defendant promised so to do, and paid the same accordingly — first taking a bond of indemnity from said Holden. The plaintiff required the defendant to pay said rent to him, and forbade him to pay to Holden, and also gave Holden notice that he would not consent to his having possession and receiving the rent.

W. Smith, for the plaintiff, cited *St.* 1785, *c.* 22, § 2. Rev. Sts. *c.* 107, § 1. *Thayer* v. *Smith*, 17 Mass. 429. *Fay* v. *Valentine*, 5 Pick. 418.

Knowles, for the defendant, cited *Reed* v. *Davis*, 4 Pick. 216. *Mayo* v. *Fletcher*, 14 Pick. 530. *Smith* v. *Shepard*, 15 Pick. 147. *Pope* v. *Biggs*, 9 Barn. & Cres. 245. *Magill* v. *Hinsdale*, 6 Connect. 465.

Dewey, J. The cases cited by the counsel for the plaintiff only establish the doctrine, that an entry by a mortgagee for foreclosure, to be effectual for that purpose, must be an entry with notice in fact to the mortgagor; or, what is equivalent, an open, notorious and continued possession. The statute provisions on this subject have, since those decisions, been somewhat varied by the Rev. Sts. *c.* 107, §§ 1 & 2, requiring notice of an entry for condition broken to be recorded in the registry of deeds. Whether such record is of itself to be deemed sufficient notice to the mortgagor, it is unnecessary now to decide; as the right of the mortgagee, in the present case, to make an entry under his mortgage, and to take the rents and profits afterwards, does not

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depend upon his having made an entry that will be effectual as an entry for foreclosure. An entry by a mortgagee, without notice to the mortgagor, is a legal entry, and will authorize the retaining of the possession and the taking of the rents and profits. *Reed* v. *Davis*, 4 Pick. 216.

The present defendant originally entered into the occupation of the premises, as lessee under one holding the rights of the mortgagor, but of course subject to the prior right, vested in the mortgagee, to enter by virtue of his mortgage; and such entry having been made by him, the defendant very properly acknowledged him as his landlord, and as such entitled to receive the future accruing rents. The case of *Smith* v. *Shepard*, 15 Pick. 147, seems to us to be an authority strongly bearing upon this point. In that case, the mortgagor had leased the premises for a term of years, and the lessee had covenanted to pay him a certain annual rent; but pending the continuance of the lease, the mortgagee entered and threatened to expel the lessee unless he would agree to pay the future accruing rents to him. The lessee having so agreed, and thus becoming accountable to the mortgagee for the rent, it was held to be a good defence to an action by the mortgagor against the lessee on his covenants to him. And in the present case, the court are clearly of opinion that the facts disclosed show that the plaintiff is not entitled to maintain his action.

Plaintiff nonsuit.

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William J. Marsh *vs.* Jefferson Bancroft.

An officer, who is lawfully directed to arrest a defendant on a writ, is answerable to the plaintiff, if he take a bail bond to which the sureties' names are forged, and thereupon discharge the defendant from custody.

It is not necessary, in order to warrant an arrest under St. 1834, c. 167, and Rev. Sts. c. 90, § 111, that the oath therein required to be taken by the plaintiff or his agent, &c. should be indorsed on the writ.

Although in an action against an officer for not taking sufficient bail, a certificate of a justice of the peace, upon the writ, that the plaintiff had "made oath as the law requires to authorize the arrest of the defendant," is not evidence that the officer was authorized to arrest him; yet other evidence is admissible to prove that the proper oath was made by the plaintiff before such justice.

Trespass upon the case against a deputy sheriff for not taking sufficient bail on a writ sued out by the plaintiff, on the 30th of June, 1835, against George W. Dixon. It appeared at the trial, that said writ was delivered to the defendant, with directions to attach sufficient property of Dixon, and for want thereof to arrest his body. On the writ was an indorsement subscribed by a justice of the peace, in these words, "Middlesex ss. On the 30th of June, 1835, personally appeared Edmund Marsh, agent of the plaintiff, and made oath as the law requires to authorize the arrest of the defendant in said action." The defendant made return on the writ, that for want of sufficient property, he had arrested said Dixon, and that he had given bail. The plaintiff recovered judgment against Dixon, and took out execution, which was returned *non est inventus;* and a *scire facias* was then prosecuted against the persons whose names appeared as sureties of Dixon on the bail bond returned by the defendant in the plaintiff's original action. It was proved on the trial of said *scire facias*, that the signatures of the supposed bail were forged; and they prevailed in their defence.

On this evidence, a verdict was taken for the plaintiff. Judgment to be rendered thereon, if the certificate indorsed on the original writ was sufficient to authorize the officer to hold Dixon to bail; or if the justice who made said certificate could have been permitted, at the trial, to amend it according to the truth, by setting forth at large the words or the substance of the oath

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which was actually taken — such oath not having been before reduced to writing; or if parol evidence were admissible, at the trial, to prove the words or substance of the oath which was taken.

L. Williams, for the defendant.

E. Fuller, for the plaintiff.

Dewey, J. An officer receiving a writ, that authorizes an arrest of the defendant, with directions to make such arrest, and having actually made it, is bound to commit to prison, or to take good and sufficient bail; and in case of his failure so to do, he is responsible to the creditor for all damages that may have accrued thereby. The evidence in this case shows an actual arrest of the debtor, and a return by the officer, indorsed on the writ, that the debtor had given bail. An instrument, purporting to be a bail bond in the case, was in fact returned by the officer; but it also appears that the signatures of the sureties in said bond were forgeries.

The duty of taking good and sufficient bail necessarily imposes upon the officer the responsibility of taking a valid bond; and the genuineness of the signatures of the obligors is at his risk. The creditor has no participation in the execution of such bond.

It being conceded that no proper bond was taken, and that the responsibility for this neglect, if any damage had ensued, would devolve upon the officer, the defendant then relies on the position, that the plaintiff delivered no sufficient process to him to authorize an arrest and impose upon him the duty of obtaining good and sufficient bail; and that if a bail bond had been taken, it would, under the circumstances of the case, have been invalid and ineffectual as a security for the creditor.

If the original process was illegal, or if it was so defective that a *scire facias* could not have been maintained on any bail bond that might have been taken, then no action could be sustained against the officer for not taking bail; because the party, in whose favor the process issued, has suffered no injury by the neglect complained of. Was the process, placed in the hands of the defendant, a sufficient and proper one to authorize an

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arrest and holding to bail? The objections to it arise under the provisions of *St.* 1834, *c.* 167, (like Rev. Sts. *c.* 90, § 111,) wherein it is enacted "that from and after the fourth day of July next, no person shall be arrested, held to bail, or imprisoned on mesne process for any debt or demand contracted subsequently to that day, unless the plaintiff, or some one of the plaintiffs, or his or their agent, shall make oath before some justice of the peace, that he has a claim against the debtor or debtors, which he believes to be justly due, and on which he expects to recover the sum of ten dollars or upwards; and that he has reasonable cause to believe that the defendant, for the purpose of avoiding the payment of a just demand, intends to leave, and remain beyond the jurisdiction of the court having cognizance of the suit, so that he cannot be arrested on an execution which may issue on a judgment in said suit." It is not denied, that this oath, in proper and apt words, was duly taken before the service of the process by the defendant; but it is urged that the evidence of the taking of such oath was not properly authenticated, before the service of the writ. If the certificate of such oath was required to be indorsed on the back of the writ, under the hand of the magistrate, before the arrest was authorized, then clearly the present certificate would be insufficient, as it should have stated the facts to which the party or his agent made oath, and not "that he made oath as the law requires to authorize the arrest of the defendant." But the weakness of the defence is found in this, that the statute does not require any certificate of the oath to be indorsed on the writ, but leaves the fact of the taking of the proper oath to be shown by evidence *aliunde*. The insufficiency of the certificate indorsed on the writ does not therefore invalidate the process, nor excuse the officer from taking bail, if the proper oath was in fact previously administered; and, as it seems to us, it is competent to prove this fact by other evidence. Such evidence would not be contradictory to the certificate already appearing in the case, but would supply the defects in it, and bring the case within the provisions of the statute.

Judgment on the verdict

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William Prescott *vs.* Jefferson Bancroft.

In a declaration against an officer for not returning a bail bond with the writ upon which he returned an arrest and the taking of bail, it is not necessary to allege that an execution against the person who gave bail was returned *non est inventus*, within a year after judgment against him; nor that such person had avoided; nor that the plaintiff in the original action, or any one in his behalf, made the oath, which by Rev. Sts. *c.* 90, § 111, is required to be made in order to warrant an arrest.

This was an action against a deputy sheriff for not returning a bail bond, in a suit brought by the plaintiff against Savels & Willey. The declaration averred, that the plaintiff sued out a writ against said Savels & Willey, and delivered the same to the defendant with directions to attach their property, and for want thereof to arrest Willey; that the defendant returned on said writ (*inter alia*), that he had arrested said Willey and held him to bail; that the plaintiff recovered judgment against Savels & Willey, and sued out execution thereon, which was delivered to the defendant for service, and which he returned wholly unsatisfied; and that the defendant did not return any bail bond with the original writ, nor at any time afterwards, though specially requested so to do within a year from the time of the rendition of the plaintiff's judgment aforesaid.

After verdict for the plaintiff, the defendant filed a motion in arrest of judgment. 1st. Because it is not alleged in the declaration, that a return of *non est inventus* was made on the execution, that issued on the judgment in the original suit, within a year after the rendition of said judgment, so that an action could be maintained on the bail bond taken in said suit. 2d. Because the declaration does not allege that Willey avoided, or that he was, at any time within a year after judgment rendered against him, without the county of Middlesex. 3d. Because the declaration does not allege that the execution, which issued on the original judgment, ran against the body of Willey; or that he could have been legally arrested on said execution, or on the original writ.

Farley and *Mellen*, for the defendant, cited *Mc Gee* v. *Bar-*

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ber, 14 Pick. 212. *Wheeler* v. *Willard*, 14 Pick. 486. *Ruggles* v. *Ives*, 6 Mass. 494.

L. Williams, for the plaintiff, cited Rev. Sts. *c.* 91, § 4. *Rayner* v. *Bell*, 15 Mass. 377. *Laflin* v. *Willard*, 16 Pick. 64.

DEWEY, J. The objections taken to the declaration cannot prevail, if sufficient matter is set forth to show a good substantive cause of action. The argument of the defendant seems to be founded upon the hypothesis, that no liability attaches to the officer for not returning a bail bond, until there has been a rendition of judgment against the debtor, an execution issued, and a return thereon of an avoidance by the debtor.

By the Rev. Sts. *c.* 91, § 4, it is made the duty of the officer, who shall make an arrest and take a bail bond, to return such bond with the writ. Any neglect of the officer, amounting to a breach of official duty, subjects him to an action; as the law presumes that damages to some extent have been sustained. *Laflin* v. *Willard*, 16 Pick. 64. The declaration, in the present case, alleges the neglect of the defendant to return the bail bond with the writ, which of itself was a breach of official duty, and would entitle the plaintiff to maintain an action, and recover damages.

The other objection taken to the declaration is, that it is defective in not averring that the plaintiff, or some person in his behalf, made the proper oath before a justice of the peace, as required by the Rev. Sts. *c.* 90, § 111, before the arrest of the body of a defendant in a civil action is authorized.

If this were an action against the officer for neglecting to make an arrest, this objection might perhaps be well taken; but where the gravamen alleged is, that the officer did in fact make an arrest and take a bail bond, but neglected to return the same with the writ, and the declaration avers, that the officer returned on said writ, that he had arrested the body of the defendant and held him to bail, it is unnecessary to allege the taking of the oath required by the statute, as the alleged return of the officer, indorsed on the writ, implies that he was legally authorized to make the arrest. Such a return would be at least *primâ facie*

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evidence that the proper authority was given him for that purpose, and if he would defend himself on the ground that the requisite oath was not previously taken by the plaintiff, this is matter of defence to be taken on his part, and to be shown by him at the trial, and does not furnish any sufficient objection to the action, upon a motion in arrest of judgment.

Judgment on the verdict.

ABRAHAM FRENCH *vs.* JEFFERSON BANCROFT.

An officer, who arrests a judgment debtor on execution, cannot lawfully hold him in custody against his consent, in order to procure an interview with the creditor, or his attorney, for the purpose of negotiating with the debtor, or for the purpose of the creditor's giving further directions to the officer as to the service of the execution.

If a judgment creditor direct an officer to arrest the debtor on execution, but not to commit him until further orders, the officer is justified in not arresting him.

TRESPASS upon the case. The declaration alleged that the plaintiff, in May, 1837, recovered judgment, in the police court at Lowell, against Edward Towne, for the sum of $16·50, and costs of suit, and sued out a writ of execution thereon and delivered the same to the defendant, a deputy sheriff, to be served upon said Towne; but that the defendant neglected to serve the same, and that said Towne, after said writ of execution was returnable, escaped to parts unknown; whereby the plaintiff was injured, &c.

At the trial in the court of common pleas, before *Williams*. C. J. the question was submitted to the jury, whether the defendant received directions from the plaintiff, or his attorney, to arrest and commit said Towne on said execution. The principal evidence on this point was contained in a deposition of the attorney who conducted the plaintiff's suit against Towne, in said police court.

The judge instructed the jury that if they were satisfied, upon the evidence, that the plaintiff, or his attorney, directed the defendant not to commit Towne, or not to commit him until the defendant should receive further orders; or to arrest Towne, but

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not to commit him until further orders; or that the plaintiff, or his attorney, gave other directions substantially to the same purport and effect — such directions would authorize the defendant to forbear to arrest Towne, and would justify the defendant in neglecting such arrest.

The judge further instructed the jury, that if the defendant had arrested Towne, he would not have been bound, nor in strictness justified, in detaining him in his own custody without committing him, in order to await the convenience of the creditor (the plaintiff) or his counsel to come and enter into negotiations and then give further orders; but that it would have been the duty of the defendant to commit Towne, after an arrest, without any unreasonable delay.

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions to the foregoing instructions. A copy of the deposition above mentioned was attached to the bill of exceptions.

Farley and *Wade*, for the plaintiff.

L. Williams, for the defendant.

Shaw, C. J. This case comes before the court by exceptions from the court of common pleas, and the only question is, whether the directions of the court were right in point of law. Much of the argument of the plaintiff's counsel turns upon an attempt to show that in point of fact the directions given to the defendant, with the execution against Towne, amounted to a positive and unqualified direction to arrest the defendant on that execution. The deposition, which it appears by the exceptions constituted the principal evidence in the case, is annexed to the bill of exceptions. But this is done, not for the purpose of a reëxamination, in this court, of the weight, force, or effect of this evidence; but for the purpose of enabling the court to ascertain the nature of the evidence, to which the instruction applied, and with a view of ascertaining the legal correctness of such instruction.

The instruction excepted to was, that if the jury should find, upon the evidence, that in giving his execution to the defendant for service, the plaintiff or his attorney directed him not to com-

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mit the debtor, or not to commit him until he, the defendant, should receive further orders; or to arrest the debtor, but not commit him until further orders; or gave other directions substantially to the same effect; such directions would authorize the officer to forbear making such arrest, till further orders. The verdict being for the defendant, and it being impossible for the court to know whether all the evidence is given in the bill of exceptions, and more especially it being incompetent for this court to decide on the weight and effect of the evidence, we are now to consider it as legally proved, and to take it as a fact, that such qualified or alternative instructions were given to the defendant, as the bill of exceptions hypothetically supposes.

In judging of the correctness of the instructions stated in the exceptions, it is necessary to consider the precise force and effect of the language used by the court. By "arrest" is to be understood, to take the party into custody. It is so used in works of authority. "An arrest is the beginning of imprisonment, when a man is first taken and restrained of his liberty by power or color of a lawful warrant." Jacob's Law Dict. Arrest. To "commit" was regarded as the separate and distinct act of carrying the party to prison, after having taken him into custody by force of the execution. It is of course to be understood that this was an instruction to govern the conduct of the officer, without regard to the consent of the debtor. If there was so material a modification of the instruction, as that he was to delay a commitment, with the consent of the debtor, it should have been shown, as it might essentially affect the rule of law governing the duty of the officer in that behalf.

In case the defendant had conformed to the direction, and arrested the debtor, to detain him till further orders of the creditor must necessarily be to detain him for an indefinite term; because he might not readily find the creditor, or the creditor might delay or decline giving him any order on the subject. Should the officer, in either of these cases, commit the debtor to prison, being without, and in effect against, the order of the creditor, he might expose himself to a complaint from the creditor for the loss of his debt, and to that of the debtor for false

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imprisonment. Should he discharge him without commitment, after a lawful arrest, the creditor might complain that he had lost his debt by the act of the officer, in voluntarily permitting the debtor to go at large, without authority from him, and claim damages for the escape.

The question then recurs, whether the holder of an execution may lawfully require an officer, to whom he delivers it for service, to take the debtor into custody thereon, and without his consent hold him in custody, without commitment to prison, for an indefinite term of time, to depend upon contingencies, or the will of the creditor himself; and whether an officer is liable for misfeasance or nonfeasance, in an action on the case, for a failure to comply with such an order; and we think he is not.

It was, in effect, an order to hold the debtor in his private custody, without his consent, at the will and for the purposes of the creditor only. Such a custody would be in derogation of the rights of the debtor. He might lose a day, or in many supposable cases more, in getting out and serving his summons with a view to his discharge under the poor debtors' act, and his term of imprisonment would be lengthened beyond that prescribed by law. The officer has no right to detain the debtor in custody, without his consent, for any length of time, for the purpose of waiting the orders of the creditor. He may undoubtedly detain him long enough to make arrangements for his removal, and such delay, referable to such a purpose, should be construed liberally and favorably for the officer. But the creditor has no legal right to extend the imprisonment any length of time, for purposes of his own; and it would be illegal in the officer so to extend it.

But it is said, that the two orders were consistent and might have both been followed; that is, the defendant might have arrested, and then after detaining the debtor as long as in law he had a right to detain him without committing, might have discharged him. Without repeating that the officer had no legal right to detain the debtor at all for such a purpose, but supposing it otherwise, no time being fixed, the law could only say, that it should be a reasonable time. But who should determine what

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is a reasonable time, or weigh all the circumstances, upon which the reasonableness of the time should depend? The officer must act at his peril, under difficult and perplexing circumstances, instead of following the plain course marked out to him by his precept and by the established rules of law; and that, involving a high responsibility to both parties.

It is said that if the defendant received the execution with these instructions, he virtually consented to comply with them. The first remark upon this is, that if it was a consent to act contrary to law and to the rights of the debtor, the officer is not bound by his assent. But another remark is, that it was probably the intention of the creditor to give a discretion to the officer, so to act in regard to the execution, if practicable, as to give the creditor an opportunity, after the arrest, to confer with the debtor; and if this could be done, with the consent of the debtor, it would be all very well, and might lead to a settlement beneficial and satisfactory to all parties. If such was the intention of the creditor and the understanding of the officer, it implied a discretion on the part of the officer, as to the time and manner of arresting the debtor, and imposed on him no positive obligation to arrest him immediately. If this is the true view of the intentions of the parties, the plaintiff cannot now insist upon his strict right to hold the officer responsible, as if no such discretionary power had been intrusted to him.

The plaintiff, in the present case, puts himself upon his strict legal right, and the officer therefore has a right to defend himself, in an action charging him with official misconduct, by showing that the direction, given by the plaintiff, was one which in strictness of law he was not bound to obey, because it would be in derogation of the rights of the debtor in a matter deeply affecting his personal liberty.

We desire to be understood as expressing no opinion that an execution creditor may not give such directions as he may think fit, as to the mode of serving his execution, consistently with the rights of the debtor, and the rules of law; nor that the officer is not bound to conform to such directions. We know that instead of suing out different forms of execution, as in England,

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in order to take the body, or lands, or goods of the debtor, our execution embraces the powers of a *ca. sa.* a *fieri facias*, a *levari facias*, &c. authorizing the officer, in the alternative, to execute it as one or the other of these writs; and there is no doubt that the creditor may elect to use the writ as the one or the other, as he pleases. He may direct the officer, if he cannot find goods, to return it unsatisfied; so if he cannot find lands, or cannot find the body; and the officer would be liable to an action for disobeying these directions. But the difference between such case and the case at bar is, that in the cases supposed the officer is subject to no additional responsibility or labor, and is required to do no unlawful act, or act contrary to the rights of the debtor. But in the present case, the plaintiff's directions required the officer to hold the debtor in custody, without his consent, in a manner and for a time not warranted by law or the precept of his warrant, and was therefore one which he was not bound to obey.

Exceptions overruled, and judgment of the court of common pleas affirmed.

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William Simonds *vs.* Levi Parker.

Francis M. Kittridge *vs.* Jefferson Bancroft.

A motion to quash a writ or dismiss an action, for causes apparent on the face of the proceedings, (except want of jurisdiction in the court,) must be made at as early a stage of the case as is prescribed by law for the reception of pleas in abatement; that is, at the first term at which an appearance is entered by the defendant, and before a plea to the action.

Where a plea in abatement was filed at the return term, and was traversed by the plaintiff, but no issue was joined, and the defendant, at a subsequent term, filed a motion to dismiss the action, assigning various causes, and among them the cause assigned in his said plea; it was held that he had waived the exception taken in his plea, and that his motion was too late.

Where a writ of replevin was framed according to the form prescribed by the repealed *St.* 1789, *c.* 26, and the officer proceeded in the service thereof, according to that statute, taking and returning a bond from the plaintiff to the defendant with one surety only, and in a certain sum, without causing an appraisement, &c. of the goods replevied, as directed by Rev. Sts. *c.* 113; it was held that a motion to dismiss the action could not be received after the return term at which the defendant appeared, and that the action should proceed to trial, as the bond, taken and returned by the officer, was valid by the common law, and the court had jurisdiction of the parties and of the subject matter.

Though it do not appear on the face of a writ, which is directed to and served by a coroner, that he had authority to serve it, yet if the contrary do not appear, and the defendant do not take the exception at the term when he enters his appearance, he cannot take it afterwards.

These were actions of replevin. The writ, in each case, was against a deputy sheriff, and was directed to and served by a coroner, no averment being made therein, that the sheriff of the county was a party, or interested.

The first of these cases came into this court from the common pleas, on the common demurrer and appeal. When it came on for trial, the defendant moved that the writ should be quashed and the action dismissed, for the causes hereinafter mentioned, and which were apparent on the face of the proceedings: 1st. Because the precept of the writ was in the form prescribed in the repealed *St.* 1789, *c.* 26, § 4, viz. to replevy the goods mentioned, provided the plaintiff should give bond to the defendant, "with sufficient surety or sureties," in a certain sum therein named, "being twice the value of said

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goods"; whereas the Rev. Sts. c. 113, §§ 19, 20, 28, 29, direct that a plaintiff in replevin, or some one in his behalf, shall give bond to the defendant "with sufficient sureties," and that "the writ shall require that such bond shall be given in double the value of the property to be replevied, but shall not express the sum or amount for which it shall be given." 2d. Because it did not appear by the return of the coroner who served the writ, that he had taken a bond from the plaintiff, in the form and substance required by law; but, on the contrary, it appeared by the bond left by him with the clerk of the court to which the writ was returned, that said bond was taken with one surety only. 3d. Because said coroner had not included in his return, indorsed on the writ, any certificate of the appointment of appraisers of the goods replevied, or of the appraisement, or of the expenses thereof; and because it did not appear by said return that the value of said goods was agreed on by the parties; as is required by Rev. Sts. c. 113, §§ 20, 21, 28, 29.

The presiding judge ordered the writ to be quashed and the action dismissed, subject to the opinion of the whole court. Said order to stand, if rightly made for the causes above set forth; otherwise, to be set aside, and the case to stand for trial

J. Russell and *Nelson*, for the plaintiff.

Crowninshield, for the defendant.

The second case (*Kittridge* v. *Bancroft*) was in most particulars like the first. At the return term in the court of common pleas, the defendant pleaded in abatement that the sheriff was not interested in the suit, and that therefore a coroner was not authorized to serve the writ. This plea was traversed by the plaintiff, but no issue was joined thereon; and at the third term, the defendant filed a motion that all proceedings in said action might be stayed and the action itself be dismissed. The reasons assigned in support of the motion were, in substance, the same as those in the other case, (*Simonds* v. *Parker*) with this additional one, viz. "because neither party was sheriff of the county when the writ was served, and it is not alleged in the writ that the sheriff of the county was nterested in the

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suit, and therefore the coroner had no legal right to serve the writ."

The judge of the common pleas, to whom this motion was addressed, granted the same, and ordered the action to be dismissed. Whereupon the plaintiff appealed to this court.

G. Parker, for the plaintiff.

E. Fuller, for the defendant.

Shaw, C. J. In the first of these actions, which was replevin for horses, &c. attached by the defendant as a deputy sheriff, the cause coming on for trial, the defendant moved to dismiss the action, on the ground of various defects and irregularities apparent upon the writ and return, and the bond which is made part of the return. These defects and irregularities are pointed out in the motion, and they appear to be defects in the form of the writ, and in the manner of serving it, arising doubtless from the cause suggested in the argument, that of following the old form of writ, instead of the form prescribed by the Rev. Sts. *c.* 113, § 29. The leading objection is, that the condition expressed in the writ was that the plaintiff in replevin should give bond with surety or sureties, whereas it should have been with sureties, in the plural; and that he was required to take bond in a fixed sum, instead of the double value, to be ascertained by agreement or appraisement; and that in executing the writ, the coroner followed these erroneous directions. Rev. Sts. *c.* 113, §§ 19–21.

It may well be conceded, we think, that as the right to prosecute an action of replevin, and to take the possession of goods, upon a mere claim of title, before trial, is conditional, and can only proceed upon the terms of complying with the requisites of the statutes, these irregularities would be fatal, had they been taken advantage of in due season, and in a proper mode. *Moors* v. *Parker*, 3 Mass. 310.

But it is contended by the defendant, that although all matters of exception to the form of process and its service are properly pleadable in abatement, yet that when such matter of exception appears upon the writ and return itself, of which the court will officially take notice without a formal plea, such motion is

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equally effectual, and may be made at any time. *Tingley* v. *Bateman*, 10 Mass. 343. *Guild* v. *Richardson*, 6 Pick. 364.

It is undoubtedly true, that where the matter of exception is apparent upon the face of the proceedings, and where all the facts are before the court, a motion to dismiss will be equally available with a plea; and that the court will take notice of the return, without prayer of oyer. *Guild* v. *Richardson*, 6 Pick. 364.

A plea is only requisite to bring before the court some matter of fact not apparent in the record and proceedings; and it is to be in the form of a plea, that it may be traversed, put in issue and tried, if not admitted by a demurrer.

It is then contended for the defendant, that because there is no time limited, by any express or positive law, for moving to dismiss an action, as in the case of a plea of abatement, it may be made at any time before judgment. But we think this is not a just conclusion. It is true that the time of filing a plea in abatement is limited by well established rules of law. But we think that the time for moving to dismiss depends upon the same reasons, and is to be governed by a rule of law equally well settled, but not so definite in its terms. In *Gage* v. *Gannet*, 10 Mass. 176, a motion to dismiss was overruled, because the defendant had waived the exception, on which it was founded, by appearing and pleading to the action. The case of *Ripley* v. *Warren*, 2 Pick. 592, was decided on the same grounds, although the writ was manifestly bad on its face in not complying with an express direction of the constitution of the Commonwealth. These cases were cited, and the doctrine affirmed, in a very recent case, in which the subject was fully considered *Carlisle* v. *Weston*, 21 Pick. 535.

The doctrine of waiver is founded upon a useful and highly reasonable principle, and one of very extensive application. Whilst the law protects the rights of parties, even in minute and unimportant matters, it requires diligence and good faith in taking advantage of its rules, to accomplish those ends and not to work injustice. *Fox* v. *Hazelton*, 10 Pick. 275. If a party

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takes no notice of any matter of exception to the form or service of the process, in an early stage of the proceedings, it affords a resonable ground to conclude that he considers them of no importance, and is willing to proceed to the trial of his rights upon the substantial merits of the controversy. By referring any question to the court, other than that of the jurisdiction itself, he acknowledges that jurisdiction. Besides, most matters of form are by statute amendable; Rev. Sts. c. 100, § 22; or if the plaintiff finds that his process is incurably defective, he may discontinue and commence anew, before the expense of litigating the merits has been incurred.

With these views, the court are of opinion that a motion to dismiss, not founded on matter of exception which shows want of jurisdiction in the court, comes too late after a plea to the action; and that by such pleading, the party, who might take such exception, if taken seasonably, must be deemed to have waived it. And as a general rule, subject to such exceptions as may take particular and special cases out of the operation of the same principle, this court, being a court of appellate jurisdiction, must consider a motion to dismiss as too late, which is originally made after the cause has come into this court by appeal, after a plea to the action and issue joined upon it, whether it be an issue of fact or law. And in an action brought originally in this court, the same rule applies to a motion to dismiss, made after the first term at which an appearance has been entered, or after a plea to the action.

It appears by the record that this action was commenced at the September term of the common pleas, 1838, and that judgment was rendered in that court, on demurrer, at the March term, 1839. No plea in abatement was filed, and no motion to dismiss was made, in the common pleas.

The only remaining question is, whether any of these exceptions tends to show that the court has no jurisdiction. The court had jurisdiction of the parties and of the subject matter, and the process was served by a competent officer. The only consideration calculated to raise a doubt was, whether the bond given by the plaintiff was of any validity. It is not a question

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here, whether a coroner who made the service could justify replevying the goods and delivering them to the plaintiff, on receiving such a bond. In *Purple* v. *Purple*, 5 Pick. 226, where a replevin bond was made to the officer, instead of being made to the defendant, it was held that no action would lie on the bond in the name of the coroner, who was the obligee, because he had no interest, and had no authority by law to take a bond as trustee for the defendant in replevin. But, in the same case, it was considered that bonds, varying in some respects from the requisitions of the statute, had been held to be good at common law, because in those cases the parties to the instrument were right, and the bond was in substance such as by law they had a right to make. In *Morse* v. *Hodsdon*, 5 Mass. 314, it was held, that where such a bond had been voluntarily executed by the plaintiff, under which he had obtained the goods replevied, he could not avoid it, although the bond did not conform to the requisitions of the statute. So in *Clap* v. *Guild*, 8 Mass. 153, it was held to be no good reason to quash a writ of replevin, that the bond was taken in a larger sum than required by law.

Without extending this review of the cases further, the court are of opinion that as in respect to the bond in question the objection is, that there were not two sureties, the bond was not on that account void, but would be binding and valid against the plaintiff and his surety. The taking of a bond in that form was an irregularity, but did not render the proceedings void; and the court are therefore further of opinion, that the order to dismiss the action be set aside, and that the cause proceed to trial.

In the case of *Kittridge* v. *Bancroft*, the exceptions are the same with those in the preceding case, with this difference, that the motion to dismiss was made in the court below, and there decided, and because also, the motion further alleges that the writ was served by a coroner, when it should have been served by a sheriff or deputy, the sheriff of the county not being interested.

In regard to the first of these points, it appears by the record

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that the action was entered at December term, 1838, and continued to the succeeding June and September terms, at the latter of which the motion was made. The court are of opinion that these continuances bring the case within the principle stated in the case just decided. The exceptions, if intended to be relied upon, should have been made at an early stage, before unnecessary cost was incurred, or some good reason shown to the court, for the delay.

As to the other ground, that the service was made by a coroner, when in fact the sheriff was not interested: This is founded on the Rev. Sts. *c.* 14, § 97, which in this respect have, to some extent, altered the former law on this subject; the former statute having directed all writs to be served by a coroner where the sheriff or either of his deputies should be a party. *St.* 1783, *c.* 43, § 1.

But the difficulty in sustaining a motion to dismiss the action upon this ground is, that the fact does not appear upon the face of the proceedings. It appears, amongst the papers, that a plea in abatement on this ground was filed, to which there was a replication traversing the fact. But no issue seems to have been ioined, and no notice is taken of it in the record; and we are to understand that it was abandoned. Indeed it was stated in the argument, that the motion to dismiss was adopted in preference to the plea in abatement, in order that the defendant might avail himself of the other exceptions; whereas the plea must be confined to the single point.

As a motion to dismiss the action, in which the court can only take notice of matters upon the face of the proceedings, including the return, it appears to us to be governed by the late case of *Carlisle* v. *Weston*, 21 Pick. 535. There, as here, the writ was directed to and served by a coroner; the defendant was described as formerly a deputy sheriff, but it did not appear as a reason for directing the writ to a coroner. Yet it was held that as a fact might exist, that is, an interest in the sheriff, which would warrant the direction of the writ to the coroner; as it did not appear, on the face of the proceedings, that he was not interested, and it could not be shown on motion, as a fact *aliunde*,

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without plea, there was no ground on which to dismiss the action. In this respect we can perceive no ground on which to distinguish the cases, or to call in question the correctness of the decision in that case; and we are therefore of opinion that the order of the court of common pleas, dismissing the action, was erroneous, and must be reversed, and the case stand for trial.

JOSEPH TAPLEY *vs.* JOSEPH BUTTERFIELD.

One partner has authority, without the consent or knowledge of his copartner, to mortgage the whole stock in trade of the firm, to secure a particular creditor of the firm.

The rule, that one partner cannot bind his copartner by deed, does not apply where one partner conveys, by deed, property of the firm which he might have conveyed without deed. Hence a sealed mortgage of the goods of the firm, executed by one partner in the name of the firm, binds both partners.

Where mortgaged goods were attached, and immediately sold on the writ, by consent of parties, it was held, that the mortgagee, even if he had notice of the sale, was not bound by Rev. Sts. *c.* 90, § 79, to make demand of payment and present his account of the sum due on his mortgage, before the sale; and that a demand, &c. thirteen days after the sale, was within a reasonable time.

TRESPASS *de bonis asportatis*. The plaintiff claimed title to the goods under a mortgage made to him as hereinafter stated. The defendant admitted the taking of the goods, and justified under a writ by virtue of which he, as deputy sheriff, attached the same in a suit by P. & B. S. Hale against the firm of A. & W. A. Blaisdell.

At the trial before *Putnam*, J. it was proved, that said firm was indebted to the plaintiff in the sum of $650, and that A. Blaisdell, one of the partners, in the absence of the other partner, and without his knowledge, executed to the plaintiff a mortgage of the goods in question, being the whole stock in trade of the firm. The separate names of each partner were several times recited in the mortgage, as conveying the goods to the plaintiff, and the instrument concluded with these words: "In witness whereof, I the said Alvah & William A. Blaisdell have here-

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unto set our hands and seals this 24th day of May, 1839." One seal only was affixed.

W. A. Blaisdell testified that if he had been present when the mortgage was given, he should not have executed it.

The goods were sold by the defendant, on the writ, by consent of parties, on the next day after they were attached. But the plaintiff did not demand payment of the money due to him, and state in writing an account of the debt for which said goods were liable to him, until thirteen days after the sale.

The defendant's counsel objected to the plaintiff's right to recover, on the ground that said mortgage was not valid, and that the plaintiff did not seasonably demand payment and state an account, conformably to the Rev. Sts. c. 90, § 79. The judge overruled these objections, and a verdict was returned for the plaintiff, subject to the opinion of the full court.

Wentworth, for the defendant. The mortgage was never executed according to the contemplation of the parties, and does not purport to be the deed of both partners. It was evidently intended that it should be executed by A. W. Blaisdell. But if it be in form the deed of the firm, yet it cannot avail to pass the interest of A. W. Blaisdell, because one partner, as such, has no authority to bind another by deed. *Cady* v. *Shepherd*, 11 Pick. 400. *Harrison* v. *Jackson*, 7 T. R. 207. *McBride* v. *Hagan*, 1 Wend. 326. *Person* v. *Carter*, 3 Murph. 321. *U. States* v. *Astley*, 3 Wash. C. C. 508.

It is not admitted that one partner has authority to assign all the property of the firm to secure a single creditor, though he may perhaps, in the permanent absence of his copartner, make such assignment for the benefit of all the creditors. 4 Wash C. C. 234. *Harrison* v. *Sterry*, 5 Cranch, 289.

The plaintiff did not render his account and make his demand within a reasonable time. When he made the demand, it was impossible for the defendant to return the goods.

L. Williams, for the plaintiff. The deed was executed in the proper form for a deed of the firm; and no further execution by A. W. Blaisdell was contemplated.

The rule, that one partner cannot bind another by deed,

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applies only to those acts which are required to be by deed. Any conveyance, which one partner has power to make so as to bind the firm, is equally binding on the firm, though a seal be unnecessarily affixed to the conveyance. *Anderson* v. *Tompkins*, 1 Brock. 456. *Robinson* v. *Crowder*, 4 McCord, 519. One partner has authority to assign the partnership effects in order to give a preference to particular creditors. *Egberts* v. *Wood*, 3 Paige, 523, 524. 1 Brock. *ubi sup.*

The plaintiff stated his account and made his demand within a reasonable time, and that is all which the Rev. Sts. *c.* 90, require.

Shaw, C. J. If it were necessary, in order to maintain the validity of the mortgage under which the plaintiff claims, to hold that one partner has a general power to bind his copartner by deed, it would certainly be difficult to maintain that proposition. The general rule is, that he cannot. *Cady* v. *Shepherd*, 11 Pick. 400. And in a case where the question is, whether one partner can by his general authority, growing out of the relation of partners, execute a deed in the name of both, in such form as to pass real estate belonging to them as partners, or to render them liable to an action of covenant, I should be strongly inclined, upon the authorities, to think that he could not. But that rule does not decide the present case.

We are not aware that a mortgage of personal property requires a deed. If an act be done, which one partner may do without deed, it is not the less effectual, that it is done by deed. It is clearly within the scope of partnership authority, (I speak of a partnership between merchants, the object of which is the buying and selling of goods,) for one partner to sell such goods as have been purchased for sale. Supposing then a customer, purchasing for some special purpose of his own, should, instead of a sale by parol, or a common bill of parcels, or a bought and sold note, choose to have a formal bill of sale under seal, in the name of the firm, and such bill should be executed by one of the partners; though the firm might not be liable to an action on the special covenants, yet the property would pass. And although the bill of sale should purport to be the act of both, it

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would not be the less the act of him who made it; and as his act would be sufficient to pass the property, it would not be less available because the name of his partner was added in such a form as to be inoperative.

Then treating this as the efficient act of one partner, in giving a mortgage upon the partnership property for the security of a partnership debt, is it sufficient to bind the property?

It is within the general scope of partnership authority for one partner to sell and dispose of all the partnership goods, in the orderly and regular course of business. It is also within the scope of partnership authority to pay the debts of the firm, and to apply the assets of the firm for that purpose. He being authorized to sell the goods to raise money to pay their debts; he may apply the goods directly to the payment of the debts; and, according to the exigencies of the occasion, he may pledge the partnership goods to raise money to pay the debts of the firm. To this extent we think each partner has a disposing power over the partnership stock, arising necessarily from the nature of that relation. If it were in the form of a consignment to a commission merchant or an auctioneer, and an advance of money obtained for the use of the firm, we think there could be no question but that it would be within the scope of partnership authority. And now that the law has given encouragement to mortgages of personal property — which is only another mode of pledging goods — and has substituted an instrument in writing capable of being recorded in the town clerk's book, and has given to such record an effect equivalent to the actual delivery of the goods, (*Bullock* v. *Williams*, 16 Pick. 33,) we cannot perceive why it may not be resorted to by partners, as well as individual persons. To what extent one partner can bind another in the disposition of the entire property of the concern, is a question of power, arising out of the relation of partnership, and does not, we think, depend upon the form or manner in which it is exercised. Lands held by partners are considered as lands held by tenants in common; and as one tenant in common cannot pass any estate of his cotenant, and as land cannot

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pass without deed, it follows that one partner cannot convey away the real estate of the firm, without special authority.

But considering that the authority of selling and pledging the personal property is within the scope of partnership power, and may be done by either partner; and considering, that it may be done without deed; the court are of opinion that such a mortgage, made by one partner in the absence of the other, although unnecessarily made by deed, was binding upon the property, and constituted a valid lien upon the property, which the plaintiff may avail himself of. *Anderson* v. *Tompkins*, 1 Brock. 456. *Deckard* v. *Case*, 5 Watts, 22.

As to the other point, that the notice was not given, and the demand made by the plaintiff upon the officer, seasonably; the case finds that the sale was made the next day after the attachment. It has been held that the demand must be made within reasonable time. *Johnson* v. *Sumner*, (*ante*, 172.) It has also been held that it is not necessary that notice should be given and demand made before a sale, even though the mortgagee has notice of the sale. By the statute, the mortgagee is obliged to state an exact and true account of the particulars and amount of his demand, and this at some peril. This he may not be able to do *instanter*, and some time must be allowed; and as none is fixed by the statute, it must be reasonable time. As the sale was made on the day succeeding the attachment, the court are of opinion that the plaintiff was not precluded from his right to recover on the mortgage because he did not give notice and make his demand before the sale of the goods.

Judgment on the verdict.

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JOSEPH VALENTINE *vs.* JAMES FOSTER.

A promise to pay a demand which the promisee had voluntarily released for the purpose of rendering the promisor a competent witness in a suit against the promisee is without consideration, and an action thereon cannot be sustained. After such release, there is no such moral obligation to pay the demand, as will support a promise to pay.

INDEBITATUS ASSUMPSIT for money paid, &c. The report of the chief justice, before whom the case was tried, was in substance this: The plaintiff was formerly owner of three eighths of a vessel in his own right, and held two eighths thereof in his name as trustee for the defendant. An action was brought against the plaintiff and others, as owners of the vessel, for a demand alleged to be due to one Vinal. In the trial of that action, the plaintiff called the defendant as a witness, who was objected to on the ground of interest; whereupon the plaintiff executed and delivered to him a release from all liability to contribution for any sum which might be recovered in that suit, and the defendant gave his testimony. Vinal recovered judgment in that suit, at the March term of this court in Suffolk, 1836; and the present action was brought to recover a part of the amount paid by the plaintiff in satisfaction of that judgment.

To maintain the action, the plaintiff offered to prove that after the trial of Vinal's said action, it appearing that the defendant's testimony was of little importance, the plaintiff proposed to the defendant to give him back the release and take no advantage of it; and that the defendant, in reply, said it would make no difference — he would take no advantage of it.

It was admitted that the plaintiff had no other ground to avoid the release, but a subsequent parol promise without any new consideration.

A nonsuit was entered, subject to the opinion of the whole court.

H. H. Fuller, for the plaintiff. A promise to pay a debt once due operates as a waiver of any mere legal discharge. The original debt, when not in fact paid, constitutes a continuing moral obligation which is a sufficient consideration for such

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promise. Chit. Con. (Perkins's ed.) 40, and cases there cited. In *Willing* v. *Peters*, 12 S. & R. 177, a debtor, after he had been released, on paying a part of the debt, was held liable on his promise to pay the balance. *A fortiori*, it would seem, is the defendant in this case liable on his promise, as he paid nothing for his release.

Welch, for the defendant. In *Willing* v. *Peters*, the release was executed at the request and for the benefit of the defendant; which distinguishes it from the present case.

The doctrine of moral obligation, as properly understood, and as illustrated by recent decisions, does not apply to the defendant's promise. See 3 Bos. & Pul. 249, *note*. Chit. Con. (Perkins's ed.) 42. *Littlefield* v. *Shee*, 2 Barn. & Adolph. 811. *Meyer* v. *Haworth*, 8 Adolph. & Ellis, 467. *Smith* v. *Ware*, 13 Johns. 257. *Mills* v. *Wyman*, 3 Pick. 207. *Cook* v. *Bradley*, 7 Connect. 57. *Loomis* v. *Newhall*, 15 Pick. 159. *Hawley* v. *Farrar*, 1 Verm. 420.

It is against the policy of the law, that the promise, in this case, should be enforced.

Shaw, C. J. The single question in this case is, whether a preëxisting liability to contribution, voluntarily released, by the party to whom it is due, to the party liable, in order to qualify him as a witness in a trial at law, between the releasor and a third party, is a good consideration for a subsequent promise to pay such contribution.

This action is one of new impression, and attempts to carry the doctrine of legal liability, arising upon an express promise made in consideration of moral obligation, somewhat further than it has yet been carried.

It is difficult to reduce this principle to a rule sufficiently accurate for practical use, on account of the looseness and uncertainty attending the notion of moral obligation or moral duty.

In *Mills* v. *Wyman*, 3 Pick. 207, where the subject was largely discussed, it was attempted to restrain and limit the generality of the principle broadly laid down, that a moral obligation is a sufficient consideration for an express promise, by confining it to cases where there has been some preëxisting legal obligation,

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which has become inoperative by force of positive law; and the cases of debts barred by the statute of limitations, by a discharge under bankrupt and insolvent laws, and debts incurred by infants, are put by way of illustration. But it is difficult to reconcile all the cases on the subject, upon this principle. *Lee* v *Muggeridge*, 5 Taunt. 36.

In some other cases, another distinction has been somewhat relied on, to wit, when there is or would be a legal obligation, but where the remedy is taken away by positive law, or where the obligor is exempted from legal liability on considerations of policy. The only case I have found, where an action has been held to lie upon an express promise to pay a debt, which had been voluntarily released, is that of *Willing* v. *Peters*, 12 S. & R. 177. It was a case where the debtor, having become insolvent, made an assignment for the benefit of all his creditors, containing a clause of release on the part of the creditors, in consideration of the assignment. A dividend had been received by the plaintiff, the creditor, after which the debtor made an express promise to pay the balance of the debt, when he should become able. There, although it was argued that the release was voluntarily made, and though it actually extinguished the whole debt, by an instrument under seal, which imported a consideration, yet the analogy was so strong to the case of a discharge under a bankrupt or insolvent law, in which it had always been held, that an action might be maintained on an express promise to pay the balance of the debt, that the court decided in favor of the plaintiff.

But we think there are several considerations which distinguish the present case from that cited.

We are then to consider, that in becoming party to an assignment made by an insolvent debtor, the release is executed at the request and for the benefit of the debtor. And it has an important bearing, in all those cases, that the discharge or exemption, by which the debtor is held not liable to an action, is created for his benefit. Then applying the rule, that a party may waive an exception made for his benefit, and that he does waive it by an express promise, it affords a strong legal ground for the mainte-

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nance of an action upon such express promise. 21 Amer. Jurist, 278. 3 Bos. & Pul. 249, *note*. But in case of a release given in court to qualify a person as witness, the act can in no sense be regarded as done at the request or for the benefit of the releasee. On the contrary, the act is for the benefit of the releasor, that he may have the advantage of the releasee's testimony; and the understanding in all such cases is, that he prefers relinquishing forever any actual or contingent claim which he may have upon the releasee, rather than forego the advantage he expects to derive from his testimony.

We also think there is another distinction between the case at bar and the case cited, founded in obvious and strong considera tions of policy. A release given to qualify a witness is usually given in open court, in presence of the jury. It must be full and complete, to the satisfaction of the court; it is exhibited and represented as an absolute and complete discharge of all interest in the event of the suit. If it should come to be consider ed that such a release merely took away a legal remedy, that it left the moral obligation subsisting in its full force, and that the legal obligation would be revived by expressions on which it might be left to a jury to find a promise; it would introduce an element of doubt, as to the force and effect of such a release. It might well be argued that it was merely formal, and left the witness still substantially interested; and would have a secret injurious effect upon the credit due to released witnesses.

Without therefore giving an opinion in reference to a case where a creditor has executed a release, to enable an insolvent debtor to obtain his discharge under a general assignment, the court are of opinion, that where a release has been voluntarily executed and delivered by a creditor to his debtor, for the express purpose of discharging all interest, and qualifying him as a witness for his own benefit, there remains no moral obligation to pay the debt, which is sufficient to afford a consideration for a new promise upon which an action will lie.

Nonsuit to stand.

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George Lawrence *vs.* James Kimball.

Where a collector of taxes died, leaving the tax of A. uncancelled on the tax list, and apparently unpaid, and the assessors committed said list to another person for collection, who took and sold A.'s property to pay said tax, and A. brought an action against one of the assessors to recover damages for such taking and sale, on the ground that said tax had been in fact paid to the deceased collector; it was held that the deceased collector's admissions, in conversation with third persons, that said tax had been paid, were not admissible in evidence.

Trespass *de bonis asportatis.* The defendant justified as an assessor of the town of Littleton. It appeared, at the trial before the chief justice, that taxes were duly assessed upon the plaintiff, by the assessors of said town, for the year 1831 and the five following years, and that tax lists were, during each of those years, duly committed for collection to Augustus Wright, who was duly elected and qualified in each of the years aforesaid as collector of taxes for said town: That said Wright died on the 26th of June, 1837, and that all said taxes against the plaintiff remained on said tax lists apparently unpaid: That said Wright's administrator delivered said tax lists to the assessors of said town for the year 1837, of whom the defendant was one, and that they, on the 16th of October in that year, committed the same, by their warrant in due form of law, to L. White, and in said warrant ordered him to complete the collection thereof: That said White, after a fruitless demand on the plaintiff for payment, took the property mentioned in the plaintiff's writ, by virtue of said warrant, and sold the same at public vendue for the payment of said taxes and costs.

The ground on which the plaintiff relied to support his action was this: That said taxes had in fact been paid to said Wright, the deceased collector, and therefore that said assessors had no authority, under the Rev. Sts. *c.* 8, § 39, to commit them to another collector. In order to prove such payment, the plaintiff offered the testimony which is hereafter mentioned in the opinion of the court. That testimony was rejected by the chief justice, and the plaintiff submitted to a nonsuit, which was to be

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set aside, if in the opinion of the court it ought to have been received, and if the action be maintainable.

B. Russell, for the plaintiff.

Nelson, for the defendant.

SHAW, C. J. It is provided by the Rev. Sts. c. 8, § 39, that if any collector shall die before completing his collection of any tax, the assessors may appoint some suitable person to com plete the collection, and may commit the same tax list to him, with their warrant accordingly, who shall have the same powers, &c. Sect. 41 directs that upon the death of any collector, it shall be the duty of his executors or administrators to deliver his unsettled tax lists to the assessors.

In this case, it appears that taxes in the town of Littleton were assessed on the plaintiff for the years 1831 to 1837, inclusive, and that the lists were committed to Augustus Wright for collection, who died on the 26th June, 1837. His tax lists, with the taxes aforesaid, assessed to the plaintiff, borne on said lists, uncancelled and apparently uncollected, were delivered by the administrator of Wright to the assessors of Littleton for 1837, of whom the defendant was one. In October of the same year, the assessors issued the lists, with a warrant to collect the same, to one White, who, after demand and neglect of payment, took the articles mentioned in the plaintiff's writ, and sold them according to law. No complaint is made of the regularity of the proceedings. That taking was the trespass complained of in this action.

A preliminary question was made, whether in any event an action of trespass would lie against the assessors or one of them, acting in their official capacity, under a mistake of the fact, and without malice. This being a mere question of law, it was decided, *pro forma*, for the plaintiff, in order to proceed to a trial of the fact; and it is mentioned now, merely to prevent the conclusion that that question is to be considered as settled by this case.

In order to maintain the action of trespass, the plaintiff proposed to show that the whole or a part of the said taxes had been paid to the deceased collector, Wright, in his lifetime

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and therefore, as to them, the collection was completed before the death of the collector; that the assessors had no authority to commit the same taxes to another collector; that the warrant to collect was not authorized by law; that it was an illegal command, and that the act done under it was a trespass.

Supposing, for the purposes of the argument, that the plaintiff is right in all other respects, in the grounds of his case, the question is, whether the evidence, offered to prove it, was competent. The plaintiff offered to prove by the testimony of several witnesses, that Wright, the former collector, had at different times, in the course of conversation, admitted to various persons, that he had received, by town orders, payment of the plaintiff's taxes; but he did not offer to prove that these taxes had been cancelled on the tax bills, or receipted for, or that any formal acknowledgment had been made by Wright, the collector, *to the plaintiff*, that his taxes had been paid, cancelled or discharged.

The first and obvious objection to the evidence offered is, that it is hearsay; that it is an offer to prove a fact, by proof of the assertion of another that it was done. It seems to be conceded by the plaintiff's counsel, that this would be decisive, unless the case is within some of the exceptions to the rule which excludes hearsay; and the attempt is to bring it within such exception, as an admission of one by whose admissions the defendant is bound. It is argued, that there is a privity of interest between the former collector, Wright, and the assessors, of whom the defendant is one, because their authority to act depended upon the act or omission of such collector; and that he stood towards them in the relation of an agent.

It is not easy to perceive this relation of agent between the deceased collector and the assessors, both acting as public officers, in their respective spheres; but if it were more obvious, it would not be applicable, unless it were shown that the declarations, relied upon as admissions, were made in the exercise, as well as within the scope, of his authority. Declarations made by an agent, after his agency has ceased, or not made in connexion with the actual exercise of his authority, are not evi-

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dence against his principal. *Fairlie* v. *Hastings*, 10 Ves. 123. *Bauerman* v. *Radenius*, 7 T. R. 663. *Framingham Manufacturing Co.* v. *Barnard*, 2 Pick. 532. If after the determination of the agency, the agent knows facts material to the acts done during its existence, he is a competent witness, and may be examined. If he be dead, it is the common case of the loss of evidence by a witness's death; but this affords no ground for letting in his declarations, if not otherwise admissible, against his principal, as admissions.

But we think the true way of considering the character and authority of the deceased collector is, to regard him as he was, an officer fully authorized to collect these taxes. If he did in fact collect them, it was an act which might be proved by any competent evidence, and by any person having occasion to prove it. If the collector had cancelled the plaintiff's tax, on his tax list, or given a receipt, it would have been an act done within the scope, and in the actual execution, of his authority, and would be evidence of the fact to be proved. So if the party liable to the tax delivered money or town orders to the collector in presence of a third person, and at the same time the collector said, that the money or orders were received in payment of taxes, such declaration would qualify the act, and show on what account they were received; and, as *res gestæ*, would be admissible. Any witness, called to prove the act of payment, might also prove such declaration, and it would not be objectionable as hearsay. But beyond this we think the evidence would not be competent.

It was argued that this was within another exception to the rule respecting hearsay, viz. that the admission was made by the collector, in a matter against his interest at the time, inasmuch as it rendered him liable to the town as for so much money collected. *Higham* v. *Ridgway*, 10 East, 109. But we think this has been confined wholly to the case of entries made in books, or other receipts, documents, or written memoranda, made by a person deceased, in relation to a matter contrary to his interest at the time, and which went to charge him with some debt or duty. 10 East, *ubi sup.* *De Rutzen* v. *Farr*, 4 Adolph. & Ellis, 53.

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This distinction was taken and relied on, and made the ground of decision, in *Framingham Manufacturing Co.* v. *Barnard*, 2 Pick. 532. It was founded mainly on the consideration of the clearness and certainty of such written memoranda made by a party, against his interest, in contradistinction to the looseness and uncertainty of verbal statements, or even of letters. We think, upon a view of the authorities, that the evidence was not admissible on that ground. It was evidence of the statements of the collector, not in writing, made to third persons, in the course of casual conversation, and not in the exercise of his authority as collector. The court are therefore of opinion that the evidence was rightly rejected, and that judgment must be entered, on the nonsuit, for the defendant.

Cynthia Blood *vs.* Elijah Wood.

The levy of an execution on land which is not the judgment debtor's does not work such a disseizin of the true owner, as will prevent his maintaining an action of trespass, without reëntry, against the judgment creditor or those acting under him.

An execution was levied on land not the judgment debtor's, being part of a large unenclosed meadow, and the judgment creditor entered thereon two or three times for the purpose of showing the grass for sale, but took no actual possession: He afterwards advertised a sale of the grass, in a public newspaper, as grass growing on his land and caused the same to be sold at auction, at a distance from the land, and the purchaser thereof cut and carried it away — the true owner of the land having no actual notice of the proceedings. *Held*, that these acts did not constitute such a disseizin or ouster of the true owner, as to prevent his maintaining an action of trespass against the purchaser of the grass

Trespass for breaking and entering the plaintiff's close in Concord, (being part of Great Meadows, so called, and a piece of upland adjoining,) and cutting and carrying away the grass there growing, in July, 1837. Defence, that said close was the soil and freehold of Josiah Davis, of whom the defendant purchased said grass, and by whose license he entered and cut it. Trial before *Putnam* J. from whose report it appeared, that the plaintiff, to prove her title to said close, gave in evidence a deed from A. B. Heywood, conveying the same to her, dated April

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17th, 1834, and registered October 15th, 1839. The defendant gave in evidence a copy of an execution in favor of said Davis against T. P. Meriam, and a levy thereof upon the same close, as the property of said Meriam; which execution and levy were registered January 14th, 1837, and returned to the office of the clerk of the court from which it issued.

Said Josiah Davis, called as a witness by the defendant, testified, that after said levy, and before the alleged trespass in question, he went upon the land several times, to show the grass to different persons; that in the summer of 1837, he three times advertised the grass, growing on said land, for sale, in a newspaper printed in Concord, which advertisements stated that the grass on his land was to be sold on a certain day, but did not state, as he recollected, where the sale was to be; that the sale was not made on that day, but was adjourned for one week, on account of unfavorable weather; that it was his impression that he gave notice of said adjournment, in the same newspaper, but could not say, with certainty, that he did so; that the sale was made at the road, a quarter of a mile from the said land, but he believed it was within sight of the land; that the sale was in presence of "a considerable number of persons from various parts of the town"; that the defendant bought the grass, at that sale, and cut and carried it away.

There was no evidence of notice to the plaintiff of the aforesaid levy or sale, except from the foregoing facts, and those which follow.

S. Barrett, called as a witness by the plaintiff, testified that he plaintiff sold him the grass on said close, in 1836, and that ne cut it. He also testified that he attended the auction, and bid on the grass, when the defendant purchased it, in the summer of 1837; that the plaintiff was and has been poor, and that she removed from Concord to Lowell, in the spring of 1836, and resided at the latter place up to the time of the commencement of this action; that he, the witness, resided in Concord, but was in the habit of going to Lowell once in a week, and that he frequently saw the plaintiff there; but he did not state at what time he was thus in the habit of going to Lowell.

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The plaintiff introduced other testimony showing that she, in 1834 and 1835, sold the grass on said close to different persons, who cut and carried it away; and that, in one of those years, "it was cut on shares."

It was agreed by the parties, that it was also proved at the trial, that the plaintiff, for many years, lived in the family of the aforesaid T. P. Meriam.

On this evidence, the defendant contended that the plaintiff was disseized, at the time of the alleged trespass, and therefore could not maintain her action; but the judge instructed the jury that the plaintiff was entitled to recover; and a verdict was returned for her accordingly. The defendant excepted to this instruction, and moved for a new trial.

E. R. Hoar, for the defendant. A disseizee cannot maintain an action of trespass, until after reëntry. Stearns on Real Actions, 409, 410. *Bigelow* v. *Jones*, 10 Pick. 161. *Allen* v. *Thayer*, 17 Mass. 299, 302. The plaintiff was disseized, at the time of the trespass alleged in her declaration. Seizin of the *locus in quo* was delivered to Davis, when his execution was levied thereon; and so far as it regarded Meriam, the mere levy, even if defective, was a disseizin. See Rev. Sts. c. 73, §§ 15, 16. *Gore* v. *Brazier*, 3 Mass. 538, 539. *Langdon* v. *Potter*, 3 Mass. 215. It was decided in *Bott* v. *Burnell*, 9 Mass. 99, that a levy is not incontrovertible evidence of seizin as against a third person, the true owner, without an actual entry, though it is so as to all others. In the present case, there was an actual entry under the levy, before the alleged trespass.

A levy on the land of a grantee under a defective deed operates as a disseizin of the grantor, so that nothing passes by his subsequent conveyance. *Gookin* v. *Whittier*, 4 Greenl. 16. The case of *Bartlett* v. *Perkins*, 1 Shepley, 87, was precisely like the case at bar, except that the judgment debtor was in possession; and it was held that the true owner was disseized by the levy, though the trespass sued for was the first entry after the levy.

One who enters under a record title is treated as a disseizor, for his own protection, when without such title he would be re-

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garded as only a trespasser. *Little* v. *Megquier*, 2 Greenl. 176. *Proprietors of Kennebec Purchase* v. *Laboree*, 2 Greenl. 275.

In *Robison* v. *Swett*, 3 Greenl. 316, it was held that where acts of ownership would amount only to trespasses, if unknown to the true owner, they may constitute a disseizin, when known by him. The facts in the case at bar show that the plaintiff had knowledge of Davis's levy. In *Proprietors of Kennebeck Purchase* v. *Springer*, 4 Mass. 416, the party in possession had no record title, and the court held that his occupation was not so notorious as to raise a presumption of notice to the true owner. See also *Higbee* v. *Rice*, 5 Mass. 344. *Pray* v. *Pierce*, 7 Mass. 381. Such occupation, as if continued twenty years would bar a writ of entry, is a disseizin in its inception. *Chapman* v. *Gray*, 15 Mass. 446. Here Davis had such an occupation.

Disseizin is a fact, to be found by a jury. *Pray* v. *Pierce*, 7 Mass. 381. *Taylor* v. *Horde*, 1 Bur. 113. If a jury, therefore, on the evidence reported, could find a disseizin, without such an abuse of discretion as would induce the court to set aside their verdict, the defendant has a right to a new trial, in order to submit that question.

Is the disseizin, in the present case, only at the election of the plaintiff? The leading case on this point is *Taylor* v. *Horde*, 1 Burr. 107, where Lord *Mansfield* came to the conclusion that in every case, except that of fines, and a statute bar, a party, whose entry is not tolled, may consider himself as not disseized, at his election.

It is submitted that this doctrine cannot be supported: 1. Because the doctrine of disseizin by election originated in extending the benefits of the assize of novel disseizin, and was intended to multiply cases of disseizin, by including some which were not strictly so at common law; and never to exclude real cases of disseizin. 2. The cases cited do not support this doctrine. They are all, except two, not cases of actual ouster, but where the disseizin obviously only existed at the election of the owner; as of a tenant conveying a larger estate, and the like. The two cases are *Bunter* v. *Coke*, & *Pouseley* v. *Blackman* — both cases

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upon the validity of a devise; and in one there had been a reëntry after the disseizin, upon which point that case turned; and in the other, the only disseizin was the grant of an estate for years by tenant at will. 3. His lordship's conclusion cannot be reconciled with the numerous cases in England and this country, where a deed has been held to pass no estate, by reason of the disseizin of the grantor; and those cases, like the one at bar, where trespass was held not to lie after a disseizin, before a re entry. 4. But however the case might have been between the plaintiff and Davis, the election cannot be made to the prejudice of an innocent third person, who came in by title, as the defendant did. He held no estate in the land, but entered under a mere revocable license, which required of him no other caution or inquiry than to see who was in the actual possession. Especially should the plaintiff not be allowed her election, when, by neglecting to put her deed on record, she had given no legal notice of her title. Her previous possession was ambiguous; it might have been held under Meriam, or it might have terminated, and the land have passed to Meriam before Davis's levy. If a deed, when recorded, has relation back to the time of its execution, it ought not to have such relation to the injury of third persons, acting honestly in ignorance of its existence.

Hopkinson, for the plaintiff. A distinction was early taken between the effect of a levy of an execution, under our statutes, on the land of the judgment debtor, and the land of a third person. This is shown by cases cited by the defendant's counsel. Thus in *Gore* v. *Brazier*, 3 Mass. 539, *Parsons*, C. J. says, if a creditor levies on land not his debtor's, he is not protected by his execution; but the true owner may maintain trespass against him. But if the levy necessarily operated as a disseizin of such owner, he could not maintain trespass. S. P. *Bott* v. *Burnell*, 11 Mass. 165, and 9 Mass. 99. *Wyman* v. *Brigden*, 4 Mass. 155. It is not to be denied that this distinction was not clearly stated in *Langdon* v. *Potter*, 3 Mass. 215.

If, however, this were not so, yet by the principles of the common law, the owner of land on which an execution is levied without legal authority, may treat the judgment creditor as a

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mere trespasser, or as a disseizor, at his election. Disseizin by election extends to all cases in which there is not an actual ouster or amotion. *Taylor* v. *Horde*, 1 Bur. 60. The decisions cited by Lord *Mansfield*, in that case, fully sustain the doctrine which he there asserted.

The acts done in this case, by Davis, after his levy, did not work a disseizin of the plaintiff. Stearns on Real Actions, 5, 39. *Proprietors of Kennebeck Purchase* v. *Call*, 1 Mass. 483. *Brimmer* v. *Proprietors of Long Wharf*, 5 Pick. 131. *Bates* v. *Norcross*, 14 Pick. 224. *Sparhawk* v. *Bullard*, (*ante*, 100.)

The evidence is insufficient to prove that the plaintiff had notice of Davis's levy, or of his acts and of those acting under him.

Shaw, C. J. In an action of trespass *quare clausum fregit*, the question is, supposing the plaintiff has proved a good title by deed, whether she was disseized at the time of the alleged trespass. A preliminary question was indeed suggested, but not much pressed, founded on the fact, that although the plaintiff's deed purports to have been executed in 1834, it was not registered until October, 1839. But as no other title, derived from the same grantor, intervened, the want of registration is immaterial, and it is sufficient that it was registered at any time before it was offered in evidence.

The question of disseizin, when it is set up to defeat the possessory interest of the true owner, and where the owner does not elect to treat himself as disseized, for the sake of his remedy, is one of considerable difficulty, depending upon technical law, and in regard to which the authorities are in some conflict.

The cause has been ably argued on both sides, and the authorities carefully examined.

There is no doubt that if the plaintiff was disseized, and so continued at the time of the alleged trespass, the action will not lie; but the question is, upon the facts, whether she was so disseized.

The disseizin is placed upon two grounds: 1. The levy of the execution of Davis upon the premises as the estate and property of Meriam, which, it is insisted, vested the seizin *de facto* in Davis, and operated as a disseizin of all others. 2. The

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actual entry under a claim of title, openly advertising and selling the crop, and the taking and carrying away of the crop of grass under a claim of title.

As to the first ground, it is undoubtedly now well settled, that the levy of an execution, under the statute, vests an actual seizin in the creditor, and ousts the debtor; so that the creditor may enter and retain possession as against the debtor, or may maintain trespass against him, or maintain a real action counting on his own seizin. *Gore* v. *Brazier*, 3 Mass. 523. But the consequence of the creditor being seized by force of the levy, and delivery of seizin by the officer, follows only in case the land was liable to the extent, and belonged to the debtor at the time of the levy. If it did not belong to the debtor, the officer acted without authority. In the leading case on this subject, *Gore* v. *Brazier*, it is stated that if the right owner be dispossessed, the act is tortious, and he may maintain trespass against the creditor and the sheriff, or he may bring his writ of entry against the creditor as a disseizor. Now it is very obvious that if he could bring trespass, he is not absolutely disseized; for, if disseized, he cannot maintain trespass, till reëntry. It is also added, that he may have his writ of entry against the creditor, as a disseizor; that is, he may elect to consider himself disseized, for the sake of his remedy, and with a view to try his title with the execution creditor; and the creditor, having elected to levy on the estate, and take seizin of the officer, would be estopped to deny the legal consequences of such act. The levy may be considered, as between the parties, as devesting the seizin of the debtor, and giving seizin to the creditor, but has no effect to disseize any other person, who is the true owner, unless accompanied with such acts as would amount to an actual ouster. *Bott* v. *Burnell*, 9 Mass. 96. 11 Mass. 165.

2. Then the question is, whether the acts detailed in the report, independent of the supposed legal effect of the levy, constituted such a disseizin of the owner as to compel her to enter, before she could bring an action of trespass. In one respect, the levy of an execution, if returned and recorded, may have the same effect as a deed recorded, in ascertaining the extent of a dis-

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seizin. If a party, without claim of title, does acts amounting to an actual ouster, it will ordinarily operate as a disseizin only to the extent of such actual ouster; but if he enter and do the same acts under color of a deed recorded, such deed, being evidence of his intent, may qualify the act of ouster, and operate as a disseizin of the whole parcel expressed in the deed. The levy of an execution being in this respect alike matter of record, may have a like effect. Still the question recurs whether the acts stated amount to a disseizin; and this depends not upon the levy in the one case, or the deed in the other, but on the nature of the acts themselves.

Instead of undertaking to give a definition of disseizin, I prefer referring to the cases where the subject is discussed and an approximation towards an exact definition effected. *Proprietors of Kennebeck Purchase* v. *Springer*, 4 Mass. 416. *Brimmer* v. *Proprietors of Long Wharf*, 5 Pick. 131. *Poignard* v. *Smith*, 6 Pick. 172. *S. C.* 8 Pick. 272.

One point seems to be well settled, which is, that very strong acts of exclusive possession, such as building, enclosing, or cultivating, and that for a long time, and openly and notoriously, are necessary in order to constitute an actual ouster of the true owner who has no notice of such acts.

The premises, in the present case, consisted of unenclosed meadow land, part of a large tract, used only for mowing. The plaintiff had disposed of the grass the two or three previous years, and had the actual possession, prior to Davis's levy of execution. That levy was made in January previous; so that he had taken no crop, at the time of the supposed trespass. He entered upon the premises two or three times, to show the grass, but took no actual possession. The grass was advertised, but it was advertised as the growth of a tract of meadow belonging to Davis, and would give the plaintiff no notice of any intention to sell the grass of her meadow. The actual sale at auction was made at the road, a quarter of a mile distant from the land. The court are therefore of opinion, that this evidence falls far short of proving an actual ouster of the plaintiff, and therefore

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that she had the right of possession as well as the better title, and might well maintain this action.

The fact last stated in the agreement, that the plaintiff for many years lived in the family of Davis's debtor, Meriam, appears to be immaterial. If it was intended to rely on the point that she held it fraudulently, upon a secret trust for Meriam, and to insist on the validity of Davis's levy upon the premises as the estate of Meriam, supposing a levy could be made under those circumstances, that ground should have been distinctly taken and the facts fully set forth, and tried by jury.

Judgment on the verdict

TIMOTHY BASCOM *vs.* SIMEON BUTTERFIELD.

An administrator who pays in full a claim against the estate of his intestate, under the belief that the estate is solvent, cannot recover back any part of the sum so paid, unless he proves the insolvency of the estate by a commission of insolvency duly issued, executed and returned, and a dividend decreed by the probate court: Hence it was held that an administrator could not recover, in such case, where the commissioners of insolvency returned a list of claims allowed by them after the expiration of the time limited in their commission, although the judge of probate had ordered a dividend to be paid to the creditors.

ASSUMPSIT for money had and received. The plaintiff was administrator of the estate of Clement Bascom, and had paid to the defendant, in full, a debt due to him from said Clement, under a belief that said estate was solvent. The plaintiff afterwards represented said estate to be insolvent, and the judge of probate thereupon appointed commissioners to examine the claims of creditors against said estate, and to return to him, in six months, a list of the claims that should be laid before them, with the sum that they should allow on each of them. Claims were allowed and returned by the commissioners, to an amount much larger than that of the assets of said intestate; and the judge of probate ordered a dividend of about 30 per cent. to be paid to the creditors by the plaintiff.

The present action was brought to recover from the defendant six tenths of the sum paid to him as above mentioned.

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At the trial in the court of common pleas, before *Williams*, C. J. it was proved that said commission of insolvency was not returned to the probate office within the time therein prescribed, and that the commissioners in fact allowed the claims, returned by them, after the expiration of six months from the time of the issuing of said commission — no further time for presenting claims against said estate having been allowed by the judge of probate. Whereupon the judge ruled that the plaintiff could not maintain his action, and a nonsuit was ordered, to which the plaintiff alleged exceptions.

E. Fuller, for the plaintiff, cited *Walker* v. *Hill*, 17 Mass. 380. *Walker* v. *Bradley*, 3 Pick. 261.

A. H. Fiske, for the defendant.

Shaw, C. J. As the plaintiff claims to recover back money voluntarily paid by him to the defendant, several years since, as creditor of the estate of Clement Bascom, of which the plaintiff was administrator, he is bound to make out a clear equitable case. The estate was supposed to be amply solvent at the time this payment was made, and was long afterwards represented insolvent by the plaintiff. A number of very large claims were allowed, apparently without objection on the part of the administrator, by which the estate appeared to be insolvent. Before he can rely upon this apparent insolvency, he is bound to show that a strictly legal course has been pursued in the settlement of the estate.

In examining the commission of insolvency and the list of debts returned by the commissioners, it appears that when the return was made, the time allowed by the judge of probate had expired; and that at the time of the allowance of the claims, the authority of the commissioners had ceased. No further time was allowed by the judge of probate. It does not therefore appear that the debts were allowed by any legal authority.

But it is contended, that this return was accepted and acted upon, and its validity recognized by the judge of probate, and that this is a ratification. But, in the first place, it does not appear by any direct adjudication, that this report of the commissioners was accepted. The judge afterwards passed a decree

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of distribution, which may be considered as an acceptance by implication. But in point of fact it does not appear that the judge knew that the commission was not returned within the time therein limited; or if he had known it, that he would have accepted it.

What would have been the proper course of proceeding for the administrator, if the commissioners had neglected or refused to return the commission in due time, either to compel them to return it, or to supersede it, or to issue a new one; it is not now necessary to decide. The plaintiff, who was the administrator, and who, more than any other person, was responsible for the regularity of the proceedings, founds his right to maintain this action on those proceedings; he relies on them to show an ultimate insolvency, which warrants him in recovering back a debt formerly paid. He can establish this claim only by showing a commission of insolvency duly issued, executed and returned, as the basis of the decree, upon which that insolvency rests. He does not show a commission so executed and returned, and therefore the court are of opinion that he cannot recover, and that the nonsuit was right.

Exceptions overruled, and judgment of the court of common pleas affirmed.

Proprietors of the South Congregational Meeting-house in Lowell *vs.* City of Lowell.

Under the Rev. Sts. *c.* 7, § 5, exempting houses of religious worship from taxation, such distinct tenements only are exempted, as are used for religious worship and purposes connected therewith; and not tenements, though under the same roof, which are used for purposes wholly secular.

Assumpsit to recover the amount of a tax assessed upon the plaintiffs for the year 1838, and paid by them to the city collector under a protest that the tax was illegal, and with a reservation of all the plaintiffs' rights.

The case was submitted to the court upon the following facts: The plaintiffs were incorporated by *St.* 1830, *c.* 123. (7

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Special Laws, 78.) On the 18th of May, 1831, they purchased a lot of land containing 9000 square feet, and in the deed of that date, conveying the land, was a condition, that the grantees, (the plaintiffs,) their successors and assigns should, within one year, erect on said land a house for public religious worship. The plaintiffs, in pursuance of a vote to build a meetinghouse, erected a building with a cellar, basement story and second story. The second story was fitted up as a church, with pews, &c.; the cellar was used for purposes connected with the church, having a furnace, &c.; and the basement story was made into five stores or shops for trade.

The plaintiffs sold said pews, and gave deeds to the purchasers, in pursuance of the following vote, which was passed December 23d, 1832, and was annexed to the several deeds: "Voted that the pews in said meetinghouse be sold at public auction, and that the holders of said pews acquire the title to, and consequent exclusive use of, and control over the pulpit, the organ, the southwest room on the lower floor, as a vestry, entrances, &c.; every pew being entitled to one vote, whether owned by an individual or by the proprietors as a corporation." "The South Congregational Society in Lowell," a religious society organized, in 1829, according to law, immediately after the sale of the pews as aforesaid, began to use and occupy said meetinghouse as a house of religious worship, and have so occupied it ever since.

In April 1832, the plaintiffs, fearing that the society would be annoyed, on the sabbath, by a building about to be erected on the adjoining land, and desirous of furnishing a larger passage way than they had for the use of said society — purchased an additional lot of land of about 2200 square feet, and, after the same had remained vacant several years, erected a building thereon, in order to furnish a more commodious vestry to said society, and also to render the property more productive. The basement story of this building was fitted up as a store, and the upper story as a vestry. The six stores, viz. five under the meetinghouse, and that under the vestry, were rented, and the income has ever since been received by the plaintiffs.

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By *St.* 1833, *c.* 132, (7 Special Laws, 361,) the said society were authorized to assess the pews in said meetinghouse, for the support of public worship, and to defray the expenses incidental thereto. Since the passing of that statute, the society have made yearly assessments on the pews for the purposes aforesaid, and the plaintiffs, as owners of the unsold pews, have been assessed in the same manner as the individual owners, and have paid the taxes, so assessed, out of the income of their said real estate. This income, viz. the rent of the stores, except that which has been paid, as aforesaid, to said society, has been applied towards payment of the debt incurred by the plaintiffs in the purchase of said lands and the erection of said buildings — the whole original cost of which is about $32,000, and about $13,000 of which the plaintiffs still owe to persons of whom they hired money for building said houses. All the income, received from said stores by the plaintiffs, has been appropriated as abovementioned.

The assessors of the city of Lowell, for the year 1838, assessed the plaintiffs the sum of $60, under the head of real estate, for "six stores under church and vestry."

Defendants to be defaulted, if said assessment was illegal; otherwise, plaintiffs to become nonsuit.

Robinson, for the plaintiffs.

Hopkinson, for the defendants.

Shaw, C. J. The plaintiffs claim exemption from taxation for general purposes, under the Rev. Sts. *c.* 7, § 5, clause 5th. That section classifies the persons and property exempted from taxation, and the clause in question is as follows: "All houses of religious worship, and the pews and furniture within the same."

In the first place, it is to be remarked that the plaintiffs are not a religious society; but they were specially incorporated for the purpose of purchasing a site for a meetinghouse, and erecting one. This they have done, and have disposed, in the form of pews, of all that part of the buildings actually used as a place of worship and for a vestry, in the upper stories of the buildings, to a religious society separately organized. But the plain-

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tiffs retain six tenements, being the story under the church and vestry, which are let as stores, and of which they take the income, appropriating it to reduce the sum of money borrowed for building the houses.

Such being the nature of the property, the court are of opinion that the exemption in the statute extended to that part of the property only which was used as a place of worship, and for purposes connected with it; such as the vestry, the furnace and the like; but did not extend to separate tenements used for purposes exclusively secular. The income raised from these tenements goes as directly to the use of the proprietors, by paying their debts, as if they made annual dividends.

There may be several distinct tenements under the same roof; and tenements are as essentially distinct, when one is under the other, as when one is by the side of the other. *Loring* v. *Bacon*, 4 Mass. 575. *Cheeseborough* v. *Green*, 10 Connect 318.

The court are of opinion that the denomination of "houses of religious worship" must be held to include such distinct tenements as are used for that purpose, and for purposes connected with it, and does not include distinct tenements used for other purposes, though under the same roof. *

The tax therefore was rightly assessed, and the plaintiffs have no right to recover back the money which they have paid.

Plaintiffs nonsuit.

* This is now expressly provided by St. 1841, c. 127.

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Mary Bruce *vs.* Jedediah Wood.

Where a husband, by a deed in his own name only, conveys his wife's land in fee, and she merely affixes her signature and seal to the deed, "in token of her relinquishment of all her right in the bargained premises," her right in fee is not thereby conveyed, and she, after the decease of her husband, may maintain a writ of entry, on her own seizin, to recover the land.

The St. 32 H. VIII. *c.* 28 — which provides that no act by the husband only shall make any discontinuance of the wife's inheritance or freehold, but that she and her heirs, &c. may lawfully enter thereupon according to their rights — is in force as a part of the common law of this Commonwealth.

This was a writ of entry to recover one undivided sixth part of three several tracts of land in Marlborough. The demandant counted on her own seizin.

The parties submitted the case to the decision of the court upon these facts: The demandant, on the 11th of April, 1800, was the wife of Isaiah Bruce, who was then seized of the demanded premises in her right, and on that day, by his deed, conveyed said premises, together with other lands, to Phinehas Sawyer, under whom the tenant claims title.

This deed was in the common form used by a single grantor, except that at the conclusion thereof the demandant, "in token of her relinquishment of all her right in the said bargained premises," signed and sealed the deed with her husband, and afterwards acknowledged the same before a magistrate.

Said Isaiah Bruce died on the 4th of February, 1837.

Tenant to be defaulted, or demandant to become nonsuit, according to the direction of the court.

Mellen, for the demandant.

Farley, for the tenant.

Shaw, C. J. The present question depends wholly upon the construction of the deed of Isaiah Bruce, the demandant's former husband, and upon the further question, whether she herself was bound by it. This deed was dated April 11th, 1800, by which Isaiah Bruce conveyed to Phinehas Sawyer certain estate described, not now in question, and "also three shares, being one half, of the reversion of dower" described; two of which are described as acquired by purchase, "the other share as I had it

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by marrying my wife." It is in respect to this one sixth of the land, of which he and his wife were then seized in her right, in reversion, that the question now arises. The deed is wholly in the name of the husband, until the closing part, which is expressed as follows: "In testimony whereof, I the said Isaiah Bruce, and I Mary Bruce, wife of Isaiah, in token that I relinquish all my right in said bargained premises, have hereunto set our hands and seals." The question is, whether this is sufficient to convey lands in fee, of which the husband and wife are seized in her right; and we are of opinion that it is not. We consider the point too well settled by the authorities to be now shaken. By the law and usage which have prevailed here from early times, the deed of husband and wife, conveying her estate, has been deemed sufficient; and where a statute authorized the barring of estates tail, by deed, conformably to the statute, it was held as a necessary result of the established law and usage, that a deed by husband and wife, duly executed, was sufficient to pass in fee an estate of which she was seized as tenant in tail. *Nightingale* v. *Burrell*, 15 Pick. 104. But it has also been steadily held, that to have this effect, the wife must join in the deed; that is, it must appear that both husband and wife were parties to the efficient and operative parts of the instrument of conveyance, and that it is not sufficient that her name was annexed, as expressing her assent to the act of her husband, and without words showing her formal participarion in the granting part of the deed. *Lithgow* v. *Kavenagh*, 9 Mass. 161. *Powell* v. *Monson & Brimfield Manuf. Co.* 3 Mason, 347. *Lufkin* v. *Curtis*, 13 Mass. 223.

In the case cited from 9 Mass. the subject was very fully considered, and we think the decision quite applicable to the present case.

The court are also of opinion, that upon the decease of her husband, the demandant was restored to her right of entry, and right to an action on her own seizin. By the ancient common law, the feoffment by the husband, of the wife's estate, operated as a discontinuance; and after his decease, she and her heirs could regain their right only by action. But this was altered by

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St. 32 H. VIII. *c.* 28, which gives the wife and her heirs a right of entry, after the decease of the husband. This statute, having been passed before the emigration of our ancestors, must be taken to be a modification and amendment of the common law in force here. Upon the facts stated, the court are of opinion that the demandant is entitled to recover.

Tenant defaulted.

ELIAKIM MORSE *vs.* GARDNER ALDRICH & others.

Heirs are jointly chargeable as assigns on a covenant of their ancestor which runs with the land that descends to them. Assigns by deed, &c. are also jointly chargeable on a covenant which runs with the land.

Where the owner of land, by a covenant which binds his heirs and assigns, engages to do a certain act when thereto requested, a written request to do such act, addressed to all the heirs or assigns, and seasonably delivered at the dwellinghouse of one of them, is sufficient; and if they neglect to do the act, they are all liable to an action on the covenant.

COVENANT BROKEN. The action was against Aldrich and his wife, and Sally Cook, who were charged, in the declaration, as assigns of Stephen Cook.

At the trial before the chief justice, it was proved or admitted that said Stephen Cook died intestate, seized of the land hereinafter mentioned, and leaving five heirs at law, of whom said Aldrich's wife and said Sally Cook were two; that after his decease, one of his other heirs conveyed his estate in said land to said Aldrich, and the two other heirs conveyed their estate therein to said Sally Cook.

The plaintiff also produced in evidence an indenture executed by the plaintiff and said Stephen Cook, dated November 14th, 1809, in which it was recited that the plaintiff was the owner of land adjoining a mill-pond which covered land of said Stephen, and which was raised and kept up by a dam also owned by him. The covenant, in said indenture, on which this action was brought, was one which ran with the land, and was in these words: "And the said Stephen Cook further covenants that he will draw off his said pond, when thereto requested by said Morse, in the

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month of August or September, not exceeding six working days in the whole, in each year," &c. The breach assigned was, that in 1836, the defendants, though requested, neglected to draw off the pond, &c.

Evidence was also given tending to prove that a written notice and request to draw off the pond, addressed to the three defendants, was delivered at the dwellinghouse of said Aldrich, at the time alleged in the declaration. Whereupon the judge instructed the jury, that the defendants, being the only owners of the pond and the dam which raised it, and jointly bound to perform the covenant declared on — a written notice addressed to all of them, and seasonably left at the dwellinghouse of one of them, was a reasonable notice and request, under the said covenant, and that a refusal or neglect to perform it, upon such notice and request, was a breach of the covenant.

Verdict, which was for the plaintiff, to be set aside, and a new trial granted or a nonsuit entered, or judgment to be entered on the verdict, according to the direction of the whole court.

G. T. Bigelow, for the plaintiff.

Mellen, for the defendants.

PUTNAM, J. The defendants are jointly chargeable in this action. They are also rightly charged as assigns of the covenantor, and this form of declaration would have been right, even if they had acquired their whole title to the mill-pond and dam by descent. *Derisley* v. *Custance*, 4 T. R. 75. Was the request, which was proved at the trial, so made as to authorize a suit for the neglect of the defendants to comply with it, according to the covenant declared on?

In *Griswold* v. *Plumb*, 13 Mass. 298, it was held that where there was a joint undertaking of defendants to take the custody of, and deliver to the sheriff, goods that were attached, a demand upon one was sufficient to charge both. So in Com. Dig. Condition, L. 11, it is said, that where a condition is to deliver possession to the lessor or his assigns, and the lessor assigns to two, a request to deliver, made by one, is sufficient. In that case, the duty was to be performed by one person to two who were

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jointly interested, and the request by one of the joint assignees was held to be valid. *S. C.* 1 Rol. Ab. 428, *Linghen* v. *Payn.*

In the case at bar, the covenant was to be performed, by two persons jointly, to one, and the demand was on one of them; and in the case of *Breerton & wife*, Noy, 135, it was ruled that if three persons assume to pay, or give, &c. upon request, if the request be made to one of them, it is good. 6 Dane Ab. 28. So in *Doe* v. *Crick*, 5 Esp. R. 196, the duty was to be performed by two tenants in common, viz. to quit the premises on request; and notice to quit, given to one, was held by Lord *Ellenborough* to be sufficient against both.

In *Terry & Lowe* v. *Reding*, Mo. 555, where two were bound to make, upon request, such assurance to a conuzee, as he or his counsel should devise, and the assurance was devised, and notice and request were made on one only to execute the assurance, who refused to do so, that notice was held good as to both. Chief Baron Comyns thus abridges that case: "If several are bound by obligation, covenant, &c. to do an act upon notice to them, notice to one is sufficient." Com. Dig. Condition, L. 9.

In *Putnam* v. *Longley*, 11 Pick. 487, it was indeed held that notice, to one of several joint plaintiffs, of the intention of a debtor in execution to take the poor debtors' oath, was not sufficient; but the decision was expressly founded on the words of *St.* 1787, *c.* 29, and was treated as an exception to the general rule.

The manner of the notice, in the case at bar, viz. by leaving it at the dwellinghouse of the party, was proper: Personal notice was not necessary, as would be necessary in cases of personal process. *Jones* v. *Marsh*, 4 T. R. 464.

Wherefore, on the authorities before cited, we think that the ruling of the chief justice was correct. Let the judgment be rendered for the plaintiff, according to the verdict.

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Alexander Coolidge *vs.* Nicholas H. Brigham.

Where goods are sold and delivered, and the seller afterwards agrees to receive in payment therefor the note of a third person, indorsed by the payee and another, and the buyer delivers such third person's note, on which the promised indorsements are forged, the seller cannot, upon discovering the forgery, maintain an action against the buyer, for goods sold and delivered, until he has rescinded the agreement and returned, or offered to return, the note.

A. agreed to procure and deliver to B. the note of W. indorsed by two other persons, and afterwards wrote to B. this letter — "I enclose you the note of W.'s, as proposed, which you will please pass to my credit." *Held*, that this was tantamount to a warranty that the indorsements on the note enclosed in the letter were genuine.

Assumpsit for goods sold and delivered, and for money had and received. There was also a count on a special agreement, to the following effect; viz. that the defendant, on the 28th of April, 1837, being indebted to the plaintiff in the sum of $306, for goods sold and delivered, in consideration that the plaintiff, at the request of the defendant, would accept and receive of the defendant, in payment for said goods, a promissory note made by George C. Whitney for $306, dated February 16th, 1837, and payable in four months to George Whitney, or order, and indorsed by him and by D. M. Whitney, undertook and promised the plaintiff, that he (the defendant) would procure and deliver to the plaintiff the said George C. Whitney's note for said sum, made and indorsed as aforesaid; that the defendant afterwards procured and delivered to the plaintiff the said George C.'s note for said sum, payable as aforesaid, and purporting to be indorsed by said George Whitney and D. M. Whitney, and that the plaintiff, confiding in the defendant's undertaking and promise aforesaid, accepted and received said note from the defendant in payment for said goods: yet that the defendant, fraudulently intending to injure the plaintiff, did not perform his said undertaking and promise, but deceived and defrauded the plaintiff in this, viz. that said note was not indorsed by said George Whitney or said D. M. Whitney, but the indorsement of their names on said note was a forgery; whereby the note became and was of no value to the plaintiff, and he was put to great expense in causing said note to be protested for non-payment by the maker,

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and giving notice to the supposed indorsers, and in attempting to collect said note by a suit at law against said D. M. Whitney, in which suit judgment for costs was rendered against the plaintiff.

At the trial before the chief justice, the plaintiff produced the following letter from the defendant to him: "Boston, April 28, 1837. Mr. A. Coolidge. Dear Sir. I enclose you the note of Whitney's, indorsed as proposed, which you will please pass to my credit, and acknowledge the receipt of the same. You will please not let Whitney know you have it. Yours, N. H. Brigham." It was also proved or admitted, that the plaintiff in fact received the note described in his special count, and that the defendant charged the same to the plaintiff, on his book; that the indorsements of G. Whitney and D. M. Whitney were forged; that the plaintiff, at the maturity of the note, demanded payment of the maker, and gave due notice of non-payment to the supposed indorsers; that he commenced a suit thereon against D. M. Whitney, on the 12th of July, 1837, and called on the defendant to furnish evidence of the genuineness of said Whitney's indorsement; and that the defendant in that suit had judgment against the plaintiff for costs. But it was also admitted by the plaintiff that he had never returned, nor offered to return, said note to the defendant.

Upon this evidence, it was insisted by the defendant's counsel that this action could not be maintained against him: 1st. Because said letter did not constitute a contract of absolute warranty of the genuineness of the signatures of the maker and indorsers, upon which an action for damages would lie by merely proving that they were not genuine, without giving notice and restoring the note. 2d. That the plaintiff could not regard the contract as rescinded, and recover as for goods sold and delivered, without returning or offering to return the note to the defendant.

The judge advised a nonsuit, which was entered, subject to the opinion of the whole court.

Buttrick, for the plaintiff. The letter amounted to a warranty. *Fielder* v. *Starkin*, 1 H. B. ; *Buchanan* v. *Parn-*

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shaw, 2 T. R. 745. *Chapman* v. *Murch*, 19 Johns. 290. *Hastings* v. *Lovering*, 2 Pick. 214. *Jones* v. *Ryde*, 5 Taunt. 488. *Salem Bank* v. *Gloucester Bank*, 17 Mass. 28. 2 Kent Com. (1st ed.) 375. *Medina* v. *Stoughton*, 1 Salk. 210.

The plaintiff, on discovering the forgery, was entitled to an action on his original cause of action, without returning the note. He might treat the note as a nullity. *Markle* v. *Hatfield*, 2 Johns. 455. *Whitbeck* v. *Van Ness*, 11 Johns. 409. *Swartwout* v. *Payne*, 19 Johns. 294. *Manufacturers & Mechanics' Bank* v. *Gore*, 15 Mass. 75. *Camidge* v. *Allenby*, 6 Barn. & Cres. 385, per *Littledale*, J.

The note was worthless, and for that reason it was not necessary to return it. *Conner* v. *Henderson*, 15 Mass. 322. The plaintiff was also entitled to retain the note as evidence in support of his suit on his original cause of action. *Waters* v. *Mansell*, 3 Taunt. 58. *Widdle* v. *Lynam*, Peake's Add. Cas. 30.

Brigham, for the defendant. The letter, which is all the evidence of the contract between the parties, does not contain or amount to a warranty. *Hogins* v. *Plympton*, 11 Pick. 97. *Bree* v. *Holbech*, 2 Doug. 654. *Chanter* v. *Hopkins*, 4 Mees. & Welsb. 399. Nor does the plaintiff's special count even aver a warranty.

In order to recover for goods sold and delivered, in such a case as this, the plaintiff must first rescind the special contract, and *demand pay* for the goods. He must also restore what he has received of the buyer; *Kimball* v. *Cunningham*, 4 Mass. 502; if it be of any value. *Conner* v. *Henderson*, 15 Mass. 322. The defendant, for aught that has been shown, might have collected the note of the maker, if it had been returned. Nor does the evidence show that the plaintiff cannot now collect it. He has not made the attempt, and therefore cannot recover on his count for goods sold. *Pope* v. *Nance*, Minor, 299. See also, *Ellis* v. *Wild*, 6 Mass. 321. *Gloucester Bank* v. *Salem Bank*, 17 Mass. 45. *Levy* v. *Bank of U. States*, 4 Dall. 234 *Bank of U. States* v. *Bank of Georgia*, 10 Wheat. 333.

Wilde, J. The plaintiff founds his claim on two grounds In the first place, his counsel contend that he had a legal right

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to rescind the contract, set out in the special count, without restoring, or offering to restore, the note therein mentioned, to the defendant.

This right, we think very clearly, cannot be maintained. A contract cannot be rescinded by one of the parties for the default of the other, unless both of them can be put in the same state as before the contract. It cannot be rescinded as to one party, and remain in force as to the other. It must be rescinded *in toto*. And if the party rescinding has received property of any value, however inconsiderable, under the contract, he must restore it to the other party.

This rule of law is well established and is not controverted by the plaintiff's counsel; but they contend that the note received by the plaintiff is worthless, and may be treated as a nullity. There is, however, no proof that the note is worthless. It is unquestionably a valid note against George C. Whitney, the maker; and if it had been restored to the defendant, he could maintain an action against him, notwithstanding the forged indorsements. He might maintain an action on the note in the name of the nominal promisee, or an action of deceit, if he purchased the note of the maker; and in either case, the note in question might be necessary to establish his claim. It is true that eventually the note may become of no value, either by the death or insolvency of the maker, or otherwise; but this possibility does not excuse the plaintiff for not returning the note. He must, if he undertakes to rescind the contract, either restore the note, or prove clearly that in no event can it be of any value. This he has failed to show, and cannot therefore be allowed to treat the note as a nullity.

The other ground, on which the plaintiff relies, is an alleged warranty, express or implied, that all the signatures of the note were genuine. But, as the declaration is framed, this ground also fails. There is no averment that the defendant promised or undertook to warrant that the signatures on the note were genuine. In the special count it is alleged that the defendant promised to procure a note signed by George C. Whitney, and indorsed by George Whitney and D. M. Whitney; that he procured

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and delivered to the plaintiff the note in question, purporting to be so signed and indorsed, but that the indorsement had afterwards been discovered to have been forged. On this count the plaintiff would be entitled to recover, if on discovery of the forgery, he had returned the note to the defendant, although there had been no warranty. For as the defendant had promised to deliver a note of a certain description, it was a breach of promise to deliver a note not truly answering that description, unless the plaintiff had accepted it knowing that the indorsements were not genuine.

The rule, we think, is correctly laid down by Chancellor Kent, in a case similar in principle. "When goods are discovered not to answer the order given for them, or to be unsound, the purchaser ought immediately to return them to the vendor, and give him notice to take them back, and thereby rescind the contract; or he will be presumed to acquiesce in the quality of the goods." 2 Kent Com. (3d ed.) 479, 480. It is clear, therefore, that the plaintiff cannot recover, unless he should be allowed to amend his declaration by counting on a sale of the note with warranty. And as the question has been argued, whether any warranty has been proved, we have considered that question.

In contracts of sales a warranty of title is implied. The vendor is always understood to affirm that the property he sells is his own. And this implied affirmation renders him responsible, if the title proves defective. This responsibility the vendor incurs, although the sale may be made in good faith, and in ignorance of the defect of his title. This rule of law is well established, and does not trench unreasonably upon the rule of the common law, *caveat emptor*. The possession of personal property is *primâ facie* evidence of title; and in many cases it would be difficult, if not impossible, before the sale, to discover the defect of title. How far this rule of law applies to the present case, may perhaps admit of some doubt. It is, however, certain that the defendant had no title whatever, on the note, against the supposed indorsers; and he had no legal title against the maker. He could not maintain an action upon it in his own name, although he might in the name of the nominal promisee

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But we do not decide the case on this point — upon which we give no decided opinion — because we think, that from the evidence reported, a warranty is to be inferred. The defendant's letter to the plaintiff, enclosing the note in question, appears to be an admission of the executory agreement, corresponding substantially with the agreement set out in the special count. In this letter, the defendant expressly affirms that the note enclosed was "indorsed as proposed." This is an express affirmation that the note was indorsed as it purported to be, or in other words, that the indorsements were genuine. This affirmation was made when the contract of sale was consummated; and it is a well settled principle of law, that an affirmation made by the vendor at the time of the sale amounts to a warranty, if it appears, on the evidence, to have been so intended. This doctrine was laid down by Lord *Holt*, in *Medina* v. *Stoughton*, 1 Salk. 210, and 1 Ld. Raym. 593, and has been uniformly adopted ever since. 3 T. R. 57. 20 Johns. 196. So also if the defendant's letter is considered as a description of the note sold, the result will be the same. The note is described as a note indorsed by George Whitney and D. M. Whitney, and was accepted as a note thus indorsed. This description is sufficient evidence of a warranty. This was fully established by the case of *Hastings* v. *Lovering*, 2 Pick. 214. That case was ably argued, and was decided after a careful examination of the authorities. The plaintiff there produced in evidence a sale note signed by the defendant, containing the words following: "Sold Mr. E. T. Hastings two thousand gallons prime quality winter oil"; and it was held that these words amounted to a warranty that the article sold agreed with the description.

The same principle is laid down by Lord *Ellenborough*, in *Gardiner* v. *Gray*, 4 Campb. 144, and in *Bridge* v. *Wain*, 1 Stark. R. 504. The case of *Higgins* v. *Livermore*, 14 Mass. 106, was decided on the same principle; it being held that an insurance upon the Swedish brig Sophia amounted to a warranty that the vessel was Swedish. In *Bradford* v. *Manly*, 13 Mass. 139, it was held that a sale by sample is tantamount to an express warranty that the sample is a true representative of the ar-

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ticle sold. So in *Gallagher* v. *Waring*, 9 Wend. 20, and *Beebee* v. *Robert*, 12 Wend. 413.

These cases establish a principle which we think decisive of the present case.

The plaintiff was at liberty either to restore the note to the defendant, or to retain it and resort to his action on the warranty. In the latter case, the measure of damages will be the difference between the amount of the note and its actual value, whatever that may be.

A new trial, therefore, will be granted, with liberty for the plaintiff to amend his declaration, by counting on the warranty; he paying the defendant his costs of the former trial, and of the present term.

ADAM WILEY & another *vs.* BURRAGE YALE.

A party, who pays a greater rate of interest than is allowed by law, cannot recover back threefold the amount of the interest paid, by an action of trespass on the case, but only by an action of debt or a bill in chancery, as provided by the Rev. Sts. *c.* 35, § 3.

The provision in the Rev. Sts. *c.* 118, § 42, that "when any pecuniary forfeiture or fine is made recoverable by bill, plaint or information, it may nevertheless be sued for and recovered by an action of debt or an action of trespass on the case," relates only to forfeitures and fines to be prosecuted for in forms adapted to criminal proceedings, where the suit is brought by the Commonwealth, or by a common informer.

Where a plaintiff, in an action of trespass on the case, obtained a verdict for threefold the amount of interest taken of him by the defendant, on a usurious transaction, and the action was continued, on the defendant's motion for a new trial, until two years had elapsed after the cause of action accrued, and judgment was then arrested, on the defendant's motion, on the ground that the plaintiff should have brought an action of debt — the court refused to grant the plaintiff leave to amend by changing the form of his action, under the provisions of *St.* 1836, *c.* 273, § 3.

SHAW, C. J. This was an action of trespass on the case, to recover back threefold the amount of usurious interest alleged to have been paid by the plaintiffs to the defendant. The Rev. Sts. *c.* 35, § 5, provide, that "whenever a greater rate of interest, than is allowed by law, shall have been paid, the party paying the same may recover back threefold the amount of the whole interest paid, either by an action of debt or by a bill in chancery;

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provided that such action or bill shall be prosecuted within two years from the time when the said interest shall have been paid."

The present action has been tried and a verdict returned for the plaintiffs. Several points were reserved upon a report; but preliminary to a discussion of these, the defendant moved in arrest of judgment, on the ground that as the revised statutes had given an action of debt or a bill in equity, this action of trespass on the case would not lie. And the court are of opinion that this action cannot be sustained.

When a statute gives a new right, and prescribes a particular remedy for its recovery, such remedy must be strictly pursued; though it is otherwise when a statute gives a right without prescribing the remedy. In the latter case, the common law affords the remedy, and any suitable form of action may be adopted. *Rex* v. *Robinson*, 2 Bur. 803. 2 Saund. Pl. & Ev. 829.

The plaintiffs supposed that the form of action, which they adopted in this case, might be maintained under the provision in the Rev. Sts. *c.* 118, § 42, that "when any pecuniary forfeiture or fine, imposed by law, is made recoverable by bill, plaint or information, it may nevertheless be sued for and recovered, in an action of debt, or an action of trespass on the case." But we think this provision relates to fines and forfeitures to be prosecuted for in the forms adapted to criminal proceedings, where the suit is to be brought by the Commonwealth, or by a common informer. See *Colburn* v. *Swett*, (*ante*, 235, 236.) The present being an action given to the party aggrieved only, is rather in the nature of a remedial suit; though by allowing a plaintiff to recover threefold the amount of the interest paid, the legislature intended to give an ample and liberal remedy to the party aggrieved, and at the same time, that the judgment should, in its character, be exemplary, and to a certain extent penal. *Lake* v. *Smith*, 1 New Rep. 178–180.

The plaintiff has moved for leave to amend, by changing the form of his action, under the authority given to the court by *St.* 1836, *c.* 273, § 3; and both parties have relied on the consideration that more than two years have elapsed since the interest, alleged to be usurious, was paid. The plaintiffs contend

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that they ought not to be deprived of their remedy by a mere accident; and the defendant insists that he ought not, at so late a stage of the proceeding, to be harassed with a new action of a harsh and penal character, and that it would be contrary to the policy, if not to the terms * of the Rev. Sts. c. 35, § 3, to allow a new action of debt to be brought after two years.

Under all the circumstances of the case, the court think it not reasonable to grant the leave to amend.

Judgment arrested, and motion to amend overruled

Bullrick, for the plaintiff.

S. Hoar and *L. Williams*, for the defendant.

ALLAN CUMMINGS *vs.* CHARLES O. PERHAM.

The provision in the Rev. Sts. c. 58, § 12, that any person may kill any dog, being without a collar, does not authorize a person to convert such dog to his own use; and a person, so converting such dog, is liable to the owner thereof, in an action of trover.

TROVER for a dog. At the trial in the court of common pleas, before *Williams*, C. J. the plaintiff introduced evidence tending to prove that the defendant converted the dog to his own use; but it was not shown that, at the time of the alleged conversion, there was about the neck of the dog a collar, with the name and place of residence of the owner or keeper legibly marked thereon, as is required by the Rev. Sts. c. 58, § 12. The defendant thereupon objected that the plaintiff could have no such title to or property in a dog not having on such collar, as would entitle him to maintain this action. The judge overruled this objection, and the plaintiff obtained a verdict. The defendant alleged exceptions.

J. G. Abbott, for the defendant. The Rev. Sts. c. 58, § 12, require every owner or keeper of a dog to cause a collar to be constantly kept about his neck; and the keeping of a dog with-

* The defendant's counsel argued that the proviso in the statutes, that '*such* action," viz. debt, "shall be prosecuted within two years," was a condition precedent, and that the court had no authority to grant the amendment.

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out such collar is in itself illegal. "No court," says Lord *Mansfield*, "will lend its aid to a man who founds his cause of action upon an immoral or *illegal* act." *Holman* v. *Johnson*, Cowp. 343. In *Law* v. *Hodson*, 11 East, 300, it was decided, under *St.* 17 Geo. III. *c.* 42, which requires that all bricks, made for sale, shall be of certain dimensions, that a seller of bricks of smaller dimensions could not recover pay for them. S. P. *Wheeler* v. *Russell*, 17 Mass. 258. *Springfield Bank* v. *Merrick*, 14 Mass. 322. *Morck* v. *Abel*, 3 Bos. & Pul. 35. *Shiffner* v. *Gordon*, 12 East, 296. *Lowry* v. *Bourdieu*, 2 Doug. 468.

As by the statute any person may lawfully kill a dog that is without a collar, it is not easy to perceive why the taking and retaining of him should be unlawful.

Wentworth, for the plaintiff.

SHAW, C. J. The court are of opinion that the ruling of the court of common pleas was right.

The cases cited for the defendant do not apply. Most of them are cases upon contracts forbidden by law, where allowing the vendor to maintain an action would have been to afford the power of the law to give effect to a contract intended to be prohibited. It is carrying the principle much further than the precedents will warrant, to say, because a man keeps or uses property in some way contrary to law, and in such manner as to expose himself to a penalty, that therefore an individual may lawfully take it away from him, and keep it with impunity.

Suppose, in the case cited from 11 East, 300, the plaintiff had made bricks for sale, of sizes contrary to law, but had not in fact sold them, nor offered them for sale. Could an individual have taken them away — or, if employed to transport them from the kiln to the owner's house, have carried them to his own, and lawfully kept them? Were he to use them, an action for the price, if maintained, would promote the very thing intended to be prohibited.

Nor does the authority, given by statute, to kill a dog suffered to go without a collar, warrant a person to convert him to his own use. The object of the statute is, not to confer a ben

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efit on an individual, but to rid society of a nuisance by killing the dog. This object would not be accomplished by a person's taking the dog to himself. This is not a case where a greater power includes a less, but where a specific power is given by law, for a specific purpose; and as the power has not been followed by the defendant, his act is not justified.

Exceptions overruled, and judgment of the court of common pleas affirmed.

JOSEPH STEVENS *vs.* ELIJAH AUSTIN.

If A. obtain the goods of B. by misrepresentation and fraud, although under the forms of a sale, and sell them to C. who has knowledge of such fraud, B. may maintain trover for them against C. without a previous demand.

Where B. received the promissory note, &c. of A. for goods which A. fraudulently obtained of him and sold to C. who had knowledge of the fraud; it was held, that B. might maintain an action of trover for the goods against C. without restoring the note to A.

THIS action, which was trover for a wagon, came before the court on exceptions to the ruling of *Warren*, J. in the trial thereof in the court of common pleas.

The defendant claimed the wagon by virtue of an alleged sale made to him by Leonard Foster. It was not denied that the wagon was once the property of the plaintiff; and there was evidence, at the trial, tending to prove that before the said alleged sale, Foster had obtained the wagon of the plaintiff by fraud and false pretences, giving his (Foster's) promissory note to the plaintiff for $85, fifteen dollars in cash, and a bill issued by the Franklin Bank in Boston, and taking from the plaintiff a bill of sale of the wagon, wherein it was valued at $100; that the wagon was never delivered to Foster, but that he carried it away without the plaintiff's consent; and that when Foster transferred the wagon to the defendant, the defendant knew that the same had been thus fraudulently obtained from the plaintiff.

The plaintiff brought said promissory note, cash and bank bill, into court, and offered to leave them on the files of the court.

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for the use of Foster, or to make such other disposition of them as the court should order.

The defendant contended that the plaintiff could not maintain this action without showing that he had restored, or offered to restore, the aforesaid promissory note, cash and bank bill, before the commencement of the action. But the judge ruled otherwise; and it was to this ruling that the defendant alleged exceptions.

Various questions, arising from the evidence, as to the character of the transactions between the plaintiff and Foster, and between Foster and the defendant, were submitted to the jury, under instructions which were not excepted to, and a verdict was returned for the plaintiff.

Wentworth and *G. Parker*, for the defendant.

L. Williams, for the plaintiff.

SHAW, C. J. The plaintiff being owner of a wagon, it was obtained from him by Foster, under the forms of a sale, but in fact, as the verdict has established, by misrepresentation and fraud. The defendant obtained it of Foster, with knowledge of the fraud. It is entirely clear, therefore, that the plaintiff had a right to maintain trover for it, and that without a demand; because the possession, both of Foster and of the defendant, was wrongful and constituted a conversion. Bul. N. P. 44. *Hurst* v. *Gwennap*, 2 Stark. R. 306. *Yates* v. *Carnsew*, 3 Car. & P. 101. *Thurston* v. *Blanchard*, 22 Pick. 18.

Then the question is, whether the plaintiff was bound to tender back the note and money he had received, before he could bring his action. We think he was not: Not to the defendant; for the plaintiff had received nothing of him. Nor could the defendant raise the question, whether the plaintiff had made restoration to Foster, or not. It was *res inter alios*, with which the defendant had no concern, and was wholly irrelative to the issue between the parties.

Exceptions overruled.

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Robert Reed *vs.* Jenness Batchelder.

A negotiable note made by an infant is voidable and not void; and if he, after coming of age, promise the payee, that it shall be paid, the payee may negotiate it, and the holder may maintain an action in his own name against the maker.

Assumpsit on a promissory note made by the defendant, on the 16th of July, 1835, payable to Reed & Dudley, or bearer. The defence was infancy.

At the trial in the court of common pleas, before *Warren*, J. the plaintiff offered evidence tending to prove that in July, 1839, after the defendant was twenty-one years old, and while said note was in the hands of the promisees, the defendant made to Henry Reed, one of the promisees, a new promise to pay the same, under such circumstances as rendered him liable upon the note. The defendant objected to the admission of this evi dence, but the judge admitted it, and a verdict was returned for the plaintiff. The defendant alleged exceptions.

Knowles, for the defendant, argued that the negotiable note of an infant is void, and not merely voidable, and therefore in capable of ratification. If such a note be not void, the maker is precluded from questioning the consideration thereof, when it is in the hands of a *bonâ fide* indorsee or bearer. *Swasey* v. *Vanderheyden*, 10 Johns. 33. *M^c^Crillis* v. *How*, 3 N. Hamp. 348. *Fenton* v. *White*, 1 South. 101. *M^c^Minn* v. *Richmonds*, 6 Yerg. 1. *Beeler* v. *Young*, 1 Bibb, 519. 2 Kent Com. (3d ed.) 234, 235. Reeve Dom. Rel. 229–231. 20 Amer. Jurist, 284, *et seq.*

G. Parker, for the plaintiff, cited *Thompson* v. *Lay*, 4 Pick. 48. *Goodsell* v. *Myers*, 3 Wend. 479. *Dubose* v. *Wheddon*, 4 M^c^Cord, 221. *Dockery* v. *Day*, 7 Porter, 518. *Whitney* v. *Dutch*, 14 Mass. 457.

Shaw, C. J. The question, what acts of an infant are voidable and what void, is not very definitely settled by the authorities; but in general it may be said that the tendency of modern decisions is, to consider them as voidable, and thus leave the infant to affirm or disaffirm them, when he comes of age, as his

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own views of his interest may lead him to elect. 2 Kent Com. (3d ed.) 235.

It seems to be established, in Massachusetts, that the note of an infant is voidable only, and may be regarded as a good foundation for a new promise when he comes of age. *Whitney* v. *Dutch*, 14 Mass. 457. *Martin* v. *Mayo*, 10 Mass. 137. *Thompson* v. *Lay*, 4 Pick. 48. And it is held in New York, that the negotiable note of an infant is voidable and not void, and may be ratified and confirmed after he comes of age. *Goodsell* v. *Myers*, 3 Wend. 479.

The only remaining question is, whether, as this was a negotiable note payable to Reed & Dudley, or bearer, and ratified by a new promise to them, whilst they remained the holders, they could make a good title by delivery to the plaintiff, Robert Reed, so as to enable him to bring the action in his own name.

The new promise to pay was made to Henry Reed, of the firm of Reed & Dudley. The effect of this was to ratify and confirm the contract, and give it the same legal effect as if the promisor had been of legal capacity to make the note, when it was made. This made it a good negotiable note from that time, according to its tenor, transferable by delivery; of course, when transferred to Robert Reed, the plaintiff, he took it as a negotiable note, and may maintain an action on it. This deprives the promisor of none of his immunities as an infant, because the law considers him as having full capacity when the ratification was made, and without such ratification no action would lie.

Exceptions overruled.

DAVIS LOCKE *vs.* GEORGE L. STEARNS & another.

All the members of a firm are answerable for a fraud committed by one of them — or by their agent acting within the scope of his authority — in the sale of partnership property.

TRESPASS upon the case in the nature of deceit. The declaration alleged that the defendants fraudulently sold to the plaintiff divers quantities of meal, as and for linseed meal, which was in

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fact a mixture of linseed meal and teelseed meal; the latter being of a quality inferior to the former, and of less value. The action was commenced against G. L. Stearns, H. L. Stearns and G. C. Hall, but the writ was not served on Hall.

At the trial in the court of common pleas, before *Strong*, J. it was proved or admitted, that the three persons above mentioned were in partnership in the business of manufacturing oil from linseed, at their factory in Medford; that the selling of linseed meal was within the regular business of said partnership; that the meal mentioned in the plaintiff's declaration was sold to him as hereinafter stated; and that, at the time of the sale thereof, L. Richardson was the foreman of the defendants in their said factory.

It was in evidence that teelseed was recently introduced into this country, and that the defendants began to use it in the making of oil, as a substitute for linseed, in the latter part of the year 1837; and that they, or some of them, began to mix the teelseed meal with the linseed meal, about the middle of January, 1838: That said Richardson, about that time, was directed by G. L. Stearns, to mix the two kinds of meal, and that H L. Stearns had said that "they put in one half teelseed meal, in the meal which they sold; and that their cattle would not eat the teelseed meal, unless linseed meal was mixed with it": That the meal mentioned in the plaintiff's declaration was sold to him at different times, during a period of several months, as linseed meal, by Richardson or by one of the defendants; that said meal, or portions of it, was a mixture of teelseed and linseed; but that the plaintiff had no notice that it was not all linseed meal; and that said meal, so mixed, was of less value than clear linseed meal.

Among other instructions, given by the judge to the jury, were these: 1. "That if one of the defendants sold the meal to the plaintiff, such defendant knowing that teelseed meal was of an inferior quality and less value than linseed meal, this knowledge would bind all the defendants, and be the same as if they all knew it. 2. That if L. Richardson, as foreman of the defendants, acting within the scope of his authority, sold the meal

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to the plaintiff, he (Richardson) knowing that teelseed meal was of an inferior quality and of less value than linseed meal, this knowledge would bind the defendants, and be the same as if the defendants knew it."

A verdict was found for the plaintiff, and the defendants alleged exceptions to the above instructions.

Farley, for the defendants, cited Watson on Partnership, (Amer. ed.) 172. *Pierce* v. *Jackson*, 6 Mass. 245. *Sherwood* v. *Marwick*, 5 Greenl. 295.

Buttrick, for the plaintiff, cited *Hern* v. *Nichols*, 1 Salk. 289. *Doe* v. *Martin*, 4 T. R. 66. *Grammar* v. *Nixon*, 1 Stra. 653. Stark on Partnership, 90. *Lobdell* v. *Baker*, (*ante*, 200, 201.) *Attorney General* v. *Siddon*, 1 Tyrw. 41. *Lord North's case*, Dyer, 161. *Bush* v. *Steinman*, 1 Bos. & Pul. 404.

Shaw, C. J. Most of the questions, in the present case, turned upon matters of fact and were decided by the jury. The evidence, taken in connexion with the verdict, shows that the purpose of the plaintiff was to purchase of the defendants linseed meal, and that the defendants, who carried on the business of manufacturing oil from seed, so understood it, but that they, that is, one of them personally, when present, and their foreman and general agent, acting within the scope of his authority, when they were absent, delivered to the plaintiff an inferior article, called teelseed meal, mixed with the linseed, in such a manner as to deceive the plaintiff, who purchased and paid for the whole as linseed, without knowledge of such mixture.

The defendants object to two of the instructions of the court of common pleas, as being incorrect in point of law. [Here the chief justice stated the instructions excepted to.] But we are of opinion that both those instructions were right. For although the action in form charges the defendants jointly for a deceit done by one only, or by an agent, yet it is still a civil action, and the claim is for damages. The deceit was done for the defendants' benefit, by their agent acting under their orders, in the conduct of their general business, and responsible to them; and when one party must suffer by the wrong and misconduct of another, it is more reasonable that he should sustain the loss, who

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reposes the confidence in the agent, than he who has given no such confidence. *Hern* v. *Nichols*, 1 Salk. 289. The point is well illustrated by the law of insurance, where the party is always held responsible *civiliter*, for the fraudulent misrepresentation or other deceit, or for the negligence, of his agent. *Fitzherbert* v. *Mather*, 1 T. R. 12. But the rule is not confined to cases of insurance, in relation to which a somewhat stricter morality, perhaps, is held to prevail; but it is laid down as a general rule of the common law, that the principal is civilly responsible for the acts of his agent. *Doe* v. *Martin*, 4 T. R. 66. In a late case, in which it was held that a master was liable for the acts of his servant in a case *quasi* criminal — as for penalties incurred by a violation of the revenue laws—it was taken for granted, on all sides, that for deceit in articles sold by a servant in the shop of his master, or for acts done in the manufacture of articles in a manufactory usually carried on by the master, the latter is answerable. *Attorney General* v. *Siddon*, 1 Tyrw. 41. *S. C.* 1 Crompt. & Jerv. 220. The rule proceeds upon the ground that the servant is acting within the scope of his authority, actual or constructive. The case of a sheriff who is liable *civiliter*, even in an action of trespass, for the misconduct of his deputy, is another familiar application of the same rule. *Grinnell* v. *Phillips*, 1 Mass. 530. The rule is laid down generally, in a recent compilation of good authority, that though a principal, in general, is not liable criminally for the act of his agent, yet he is civilly liable for the neglect, fraud, deceit or other wrongful act of his agent in the course of his employment, though in fact the principal did not authorize the practice of such acts; but the wrongful or unlawful acts must be committed in the course of the agent's employment. 3 Chit. Law of Com. & Man. 209, 210.

As to the other point, which is indeed little more than a further application of the same principle; it is laid down, as the general rule, that one partner is liable *civiliter* for damages sustained by the deceit or other fraudulent act of his copartner done within the scope of his general partnership authority. Collyer on Partnership, 241. *Rapp* v. *Latham*, 2 Barn. & Ald. 795. *Willet* v. *Chambers*, Cowp. 814.

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Two cases were cited, by the counsel for the defendant, to support the contrary doctrine; but we think they are both distinguishable from the present. In *Pierce* v. *Jackson*, 6 Mass. 245, it is said by *Parsons*, C. J. in the course of his opinion, that "a fraud committed by one of the partners shall not charge the partnership." This must be taken in connexion with the subject matter to which it was applied. That action was not brought by an innocent party who had sustained damage by the fraudulent act of a partner in the course of the partnership business. On the contrary, it was a case of competition between different classes of creditors, one of whom was a creditor of one of the partners, and the other claimed a preference as creditor of the firm. But it appeared that one of the partners had, by fraud and by means of a forged indorsement of a note, given or attempted to give the latter creditor a preference to which he was not entitled. It was in reference to this transaction, that the remark above cited was made. The plaintiff, in that case, must have been in collusion with one of the partners to obtain an undue preference; and to have sustained the claim of preference, under those circumstances, would have been to give effect to a fraudulent and collusive act, in favor of a party to the collusion, against an honest creditor.

The other case cited was *Sherwood* v. *Marwick*, 5 Greenl. 295. In that case, two persons were the beneficial owners of a foreign vessel held in the name of a third person. One of them, under a power from that third person, sold the vessel, and at the time of the sale made a false representation of her national character. The other was sued by the purchaser, in an action to recover damages alleged to have been sustained by reason of such false representation. It was held that he was not liable. The defendant and the seller, in that case, were not general partners, if indeed they were partners at all. The seller was not the general agent of the defendant, nor had he any authority, actual or constructive, to act for him. It seems to us therefore quite clear that the decision in that case is not in conflict with ours in the present.

Exceptions overruled.

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Zenas Thompson *vs.* Lemuel Page.

Several members of an unincorporated religious society mutually agreed in writing to take and pay for the number of shares, affixed to their names, in the stock of a meetinghouse which they proposed to build, and to pay a certain sum on each share to such person as the majority of share holders present at a meeting to be held for that purpose should elect as treasurer; such treasurer to give bond, with sureties, for fidelity, &c., and to pay over the money received by him to the treasurer that should be elected by the share holders when they should be organized under an act of incorporation which they intended to obtain. A. subscribed for shares in said stock, and B. was chosen treasurer, and gave bond as provided for in said agreement of the subscribers. The subscribers afterwards obtained an act of incorporation, organized under it, and chose C. treasurer. A. refused to pay the sum which he had subscribed, and B. brought an action against him to recover the same. *Held*, that there was a sufficient consideration for A.'s promise, and that the action thereon was rightly brought by B.

Assumpsit on the following agreement, dated January 1st, 1838: "Whereas, the Second Universalist Society in Lowell are in want of a suitable house of worship, and are desirous that a house be erected as soon as may be, that is, as soon as sufficient funds can be furnished for that purpose; and whereas said society are not incorporated, but intend to apply for an act of incorporation at the next session of the general court, and are desirous of collecting sufficient funds for erecting said building, so that they may commence operations as soon as the act of incorporation is obtained; and whereas it is proposed, for the purpose of raising and collecting said funds, to divide the stock of said corporation into shares of twenty-eight dollars each, and to be taken up as soon as may be: Therefore, for the purposes aforesaid, and in consideration of the mutual promises herein made of and to each other, we the subscribers mutually agree to and with each other, in the manner following; to wit, to take up the amount of stock, and pay in the same, as hereinafter provided, which is set and affixed to our respective names; to pay into the hands of a treasurer to be chosen by a vote of the holders of a majority of the stock then subscribed for, that shall be present at a meeting to be called and notified by at least ten members, when they deem expedient, one half the amount of

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stock then subscribed for, in three months from the date hereof, and the residue within the three months then next succeeding: Said treasurer, when chosen as aforesaid, is to give bond, with sufficient sureties, to such person or persons as a majority of the subscribers present at said meeting shall direct, to secure the faithful care, judicious management, and prompt payment, of all moneys, paid into his hands by said subscribers, to the treasurer that may be chosen and duly qualified under the act of incorporation, whenever he shall be thereto requested: An organization under said act, if obtained, is to be had as soon as may be, and the moneys then paid in, as provided by this instrument, are to be applied as follows; to wit, twenty-five dollars of each share is to be applied and appropriated towards the building of the house aforesaid; the remaining three dollars of each share is to be kept forever as a fund for the purpose of redeeming the shares of any stockholders that may, from time to time, leave said Lowell and take up a permanent residence elsewhere: Provided that not more than $25 shall ever be paid in the redemption of any one share: So much of said house as may be wanted for the purpose of religious worship is always to be for the exclusive use and enjoyment of said Second Universalist Society, they paying reasonable rent therefor: Said treasurer, when chosen as aforesaid, shall have full power, in his own name, to sue and collect the shares of said subscribers, and cause the same to be paid into his hands, unless voluntarily paid according to the terms of this instrument, and to give valid receipts for the same; provided nevertheless that this instrument may be rendered null and void, at any time, by the assent and concurrence of the holders of at least three fourths of the amount of stock then taken up, such assent and concurrence to be in writing and deposited in the hands of the treasurer: Provided further, that if any person or persons are desirous not to have any interest in or claim for the redemption of their shares, upon the fund for the redemption of shares, as aforesaid, they may, by paying the sum of $25, at the time and in the manner aforesaid, be entitled to a full share, or any number of shares, at the same rate, in the house aforesaid; but to no interest in or claim on the re-

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deeming fund aforesaid; provided such wish be expressed in writing, with the names, when they subscribe this instrument."

The declaration alleged that the defendant signed said agreement and thereby engaged to take twenty shares of said stock, and pay to such person as should be chosen treasurer, as aforesaid, the sum of $500, at the times aforesaid: That on the 22d of January, 1838, a meeting of the holders of the stock then subscribed for was held, according to the provisions of said agreement and that the plaintiff was then chosen treasurer by a majority of the holders of said stock who were present at said meeting, and that he gave his bond with sureties according to the said agreement: That the defendant, though often requested, had refused to pay the amount of his said subscription, according to the terms thereof.

At the trial before the chief justice, the main allegations in the plaintiff's declaration were admitted or proved, and that equal assessments were laid on all the shares subscribed for, to raise money for the purposes expressed in the agreement; that the assessments on the defendant's shares amounted to $500, of which he had due and reasonable notice, that demands were made on him by the plaintiff for the amount of the assessments, as they were made, and he refused to pay them. It further was proved, that most of the associates had paid their assessments; that a house had been built, as proposed; and that an act incorporating the Second Universalist Society in Lowell was passed March 2d, 1838. (*St.* 1838, *c.* 22.) The incorporated society was organized April 7th, 1838, and a Mr. French was chosen treasurer, before this action was brought, and before the demands aforesaid were made on the defendant.

Upon this case, the defendant contended that the plaintiff was not entitled to recover.

1. Because the instrument declared on does not confer a right of action upon the treasurers; that if there is any right of action upon it, it is between the parties themselves and cannot be assigned to a third person. 2. That if an action can be maintained at all upon the contract by any treasurer, it is by the treasurer of the incorporated society and not by the plaintiff.

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3. That it ought to appear by the declaration for whose use and benefit the action is brought, and does not so appear.

The question being a question of law upon the construction of the contract, and facts not in controversy, a verdict was taken for the plaintiff, subject to the opinion of the court.

If the action can be maintained, judgment to be entered on the verdict; otherwise, the verdict to be set aside and the plaintiff to become nonsuit.

L. Williams, for the defendant.

Farley and *G. Parker*, for the plaintiff.

Shaw, C. J. The liability of the defendant, in the present case, depends upon the construction of the agreement executed by him. It recites that the Second Universalist Society in Lowell, which was at the time an unincorporated association, were in want of a suitable house of worship, and were desirous that such a house should be erected as soon as funds could be furnished for that purpose; it recites also their intention to become incorporated forthwith, and to divide the stock into shares of twenty-eight dollars each, or, at the option of subscribers, to subscribe twenty-five dollars a share, without certain privileges. Then the subscribers, for the purpose aforesaid, and in consideration of the mutual promises therein made, mutually agreed to take the amount of stock subscribed by each, and to pay into the hands of a treasurer, to be chosen, &c., one half in three months, and one half in three months more; said treasurer to give bond, with surety, to persons to be appointed, &c., to secure the faithful management of the moneys, and the payment of the same to the treasurer to be chosen and qualified under the act of incorporation, when duly requested. It further provided that said treasurer, when chosen as aforesaid, should have full power in his own name to sue and collect the shares of said subscribers, and to cause the same to be paid into his hands, unless voluntarily paid according to the terms of the instrument. The instrument contains some other provisions, not considered essential to the question. It was subscribed by the defendant for twenty shares, and by a great number of other persons. The society was duly incorporated in March following

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The plaintiff was chosen treasurer by the associates, and gave bonds, in all respects conformably to the terms and provisions of the agreement.

The question is, whether an action can be maintained by the plaintiff in his own name, for the amount of the defendant's subscription.

A question was made at the argument, whether this was to be deemed a promise to the treasurer, first provided for, to be chosen before the organization, or the treasurer to be chosen by the corporation, when organized. It appears to the court, that this does not admit of a doubt. The obvious purpose was to raise funds, before the act of incorporation, "so," as it is expressed in the agreement, "that they may commence operations as soon as the act of incorporation is obtained." It was therefore an express promise to pay to the treasurer of the associates, when chosen and qualified as therein specified, with an express authority to him to sue for the same, if not paid voluntarily.

We think it is no sufficient objection to the plaintiff's legal right to recover, that he was not the person to whom the promise was made, at the time of subscription. Until some person was chosen a treasurer, it might be considered as an offer only, or a revocable promise; but if before any revocation of such promise, the plaintiff was chosen and qualified, then it is the same as if the promise were made to the plaintiff by name. Where one offers to pay any person who shall peform a particular service, as a reward for the restoration of lost property, or for information on a particular subject, the person who shall perform the service, or give the information, before the offer is withdrawn, becomes the party to whom the promise is made, as if made to him by name. In *Fisher* v. *Ellis*, 3 Pick. 322, a promise to a parish treasurer, and his successors, for the benefit of the parish, was held to be a promise to each successive treasurer, to be chosen; and a promise on which an action would lie by a treasurer chosen long after the promise. It is not put on the ground that treasurers of towns and parishes may by statute sue on promises to their predecessors; though perhaps the

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decision may have been influenced thereby. But that case is a strong authority in favor of the plaintiff in other parts of the case.

There being then an express promise, made by the defendant to the plaintiff, to pay him a sum of money, for the use of the associates, the principal question is, whether there appears to be a sufficient consideration for that promise, to support an action. The general doctrine on this subject was so much considered, and the cases so fully reviewed, in *Amherst Academy* v. *Cowls*, 6 Pick. 427, that it is unnecessary to consider them at large. The object of the associates was to raise a fund, to be invested in a house, in which all the associates were to have an interest, in proportion to the number of their respective shares. This was to be done through the medium of an act of incorporation, in which the defendant was to be included. Such an act of incorporation was in fact obtained shortly after, and before the defendant's promise was rescinded or revoked. By force of this act, and under the denomination of an "associate," the defendant became interested in the stock and property of the corporation. And although the legal interest in such stock and property was in the corporation, yet the defendant had an equitable interest, as *cestui que trust*, for which he had a remedy by bill in equity, if his right should be called in question. When the consideration moves from one or more persons, and by their appointment the promise is made to a third person, for their benefit, it is a good consideration for such promise, and the person to whom such promise is made, may maintain an action upon it. 3 Pick. *ubi sup.* *McAuley* v. *Billenger*, 20 Johns. 89. If it be said that at the time the subscription was signed by the defendant, it was contingent and uncertain whether an act of incorporation would be obtained, and so the promise was contingent; one answer has already been alluded to, which is, that even if that circumstance rendered the promise revocable and conditional, yet if not revoked nor rescinded until such act of incorporation was passed, the consideration then became complete, and the promise absolute. Such act of incorporation was obtained before the first demand was made on the defendant. But

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we think there is another legal and satisfactory answer. There was a consideration moving from the plaintiff himself in the fact that he gave bond, with sureties, to persons appointed by the associates, conditioned to take care of the fund so to be collected, and account for the same, and pay over the amount to the treasurer of the corporation, when requested. Now, if no act of incorporation should ever be obtained, the plaintiff would have been liable, as trustee, to account for the money thus received, to the associates respectively, according to their respective proportions. The adequacy or sufficiency of the consideration is not material to this question. The giving of a bond with sureties is a burdensome service, and if done at the request and for the benefit of another, is a good legal consideration for an express promise. Suppose, for instance, that a contract were made, in these terms: B. in consideration that A. will give bond with surety to appropriate and pay over certain moneys, to be contributed by himself and the rest of the alphabet, to a use, in which B. has an interest, promises to pay A. a certain sum, and A. in pursuance of this promise gives bond accordingly; we think it is a good legal consideration for the express promise by B. to pay a sum of money. Whether, therefore, it be regarded as a promise made to the plaintiff by appointment of the associates for their benefit, and on a consideration moving from them, and consisting of a benefit to the defendant, in the interest he was to have in the corporate fund; or as a promise made to the plaintiff on a consideration moving from himself; the court are of opinion that it was a valid promise, upon which this action may be maintained.

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SUPPLEMENT.

Since St. 1839, c. 156, took effect, (which imposes on counties the expense of supporting all prisoners in jails and houses of correction, who have no settlement in the Commonwealth,) money received by towns and cities, under the alien passenger act — St. 1837, c. 268, § 3 — cannot be appropriated for the support of aliens who are prisoners in houses of correction, and are unable by labor therein to pay for their maintenance. The term "foreign paupers," in said 3d section does not now apply to such prisoners.

THE justices of the supreme judicial court, in compliance with the request of the honorable the House of Representatives, made by their order of 25th February, 1841, have taken into consideration the following question proposed by them, as follows: "Does the term 'foreign paupers,' as expressed in the third section of the two hundred and thirty-eighth chapter of statute 1837, apply to aliens, who are prisoners in houses of correction, and unable by labor therein to pay for their maintenance; and can moneys, received under the said third section, be applied by a city or town for the support of said prisoners?" And in answer thereto, they ask leave respectfully to submit the following opinion.

The question proposed does not admit of a simple and direct answer, but appears to us to depend upon a comparison and analysis of several distinct statutes, in relation to houses of correction. These statutes make a manifest and marked distinction between rogues, vagabonds and vagrants, sent to the house of correction for employment and reformation, and persons sentenced to imprisonment as a punishment upon conviction for crimes. This distinction extends as well to their punishment as to their support.

The first act, which we think it necessary to refer to, is St. 1787, c. 54, being an act for the punishment of rogues, vagabonds and other idle and disorderly persons. It provides for

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the erection and maintenance of houses of correction in each county, and for the confinement therein and compulsory employment of the class of idle and disorderly persons enumerated in the first and second sections of said act, who are regarded rather as idle and vicious paupers, who are to be brought into habits of regularity, sobriety and industry, by forced labor, than as convicts to be punished for crimes. The act provides for the appointment of masters for the houses of correction, by the court of sessions, who are to set such vagabonds to work, and place them under proper discipline. Materials were to be provided by the town, or by parent or master ; but this was altered by *St.* 1802, *c.* 22. The earnings of the person committed were to go partly to his own use, and partly to the master of the house ; but in case of his inability to support himself, he is to be provided for by the master, who shall be reimbursed the same by the parent, master, town or the government, who were by law obliged to maintain such persons, when unable to support themselves, as the case might be. By this act, such vagabonds or vicious paupers were not committed to the house of correction for any fixed time, but the overseers of the poor, (and by subsequent statutes the overseers of such houses,) were authorized, under certain circumstances, to discharge them, when in the judgment of such overseers the ends of such commitment had been answered.

So far was this considered rather as a correctional than as a penal system, that no mode of trial was provided. The second section directed that any justice of the peace, as well as the court of sessions, might send and commit to said house, to be kept, &c. all rogues, &c. as before enumerated, but for no fixed term. No provision was made for the trial of facts. Such an act, it is believed, was felt to be so contrary to the plain principles of justice, and to the provisions of the constitution of the Commonwealth, which requires that all charges of crime, on which a party may be proceeded against, shall be fully and plainly, substantially and formally described to him, and which secures to every subject a trial by jury, that several important changes were made by *St.* 1822, *c.* 82. This provided, first, for a complaint in writing and under oath ; secondly, for an ap-

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peal and trial by jury; thirdly, a limitation of the confinement to a term not exceeding six months, or, upon a second commitment, one year. Still, it was so far regarded as correctional, that a majority of the overseers of the house of correction had authority to discharge the person committed, within the time, whenever it should appear to them that he had reformed and become willing to return to an orderly course of life.

St. 1797, *c.* 62, made provision for the appointment of overseers of the house of correction, and defined their powers, but did not otherwise essentially change the act.

St. 1802, *c.* 22, made some further slight modifications, and § 2, gave the master an action, after his account had been examined, allowed and certified, against the person himself, his kindred liable for his support, or the town of his settlement, if any, after demand, to recover the amount due for the support and maintenance of such persons.

This act first provided, that persons liable to a sentence of imprisonment, on conviction for crimes and offences, might be imprisoned in the house of correction: and it further went on to declare, that the expense of keeping, supporting and employing such convict, after deducting his earnings, should be paid out of the county treasury in the first instance, and reimbursed by the Commonwealth. These provisions for sending convicts of a certain class to the house of correction for punishment, instead of the state prison and county jail, were extended by *St.* 1818, *c.* 23, and the expense, over and above the proceeds of the convicts' labor, was directed to be paid as in case of convicts in the state prison.

Afterwards, by *St.* 1819, *c.* 163, it was directed that the account, when examined and allowed, should be paid by the county treasurer, and by him charged to the Commonwealth.

From this view of these several enactments, it is manifest, we think, that those persons who were sent to the house of correction as vagrants, (using one term to designate the class,) were regarded as paupers, and their support was provided for in the same way as that of other persons standing in need of relief; that is, it was first to be a charge upon themselves, if able, then upon their kindred, if any, liable for their support, next upon

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the town of their legal settlement, if any, in the Commonwealth, and last of all, and in failure of all other resources, upon the Commonwealth. Whereas, persons sentenced to the house of correction instead of the state prison or county jail, upon conviction for other offences, were regarded as criminals, whose support was first paid for out of the county treasury, but ultimately by the Commonwealth, not upon their liability for the support of state paupers, but as one of the expenses incidental to the administration of criminal justice. This distinction is stated and explained in *Boston* v. *Westford*, 12 Pick. 16.

In a review of the statutes on this subject, it may be proper to refer to a special act, *St.* 1824, *c.* 28, passed a few years after the incorporation of the city of Boston, by which it was provided, that the house of correction within the city of Boston should be the house of correction for the county of Suffolk; authorized the city government to appoint a master and overseers, directed that the city should defray all expenses of the house, and should have the same remedies to recover the charges of maintaining any person therein, that masters or overseers of any house of correction have, or that towns or counties are entitled to by law. Whether this special act was repealed by *St.* 1834, *c.* 151, making other and inconsistent provisions for the city of Boston and the county of Suffolk, is alluded to as an open question in *Boston* v. *Weston*, 22 Pick. 213. The action of *Robbins* v. *Weston*, 20 Pick. 112, was brought in the name of the master, on *St.* 1834, *c.* 151, § 10. But in neither case did the question come directly before the court; and it is probably now immaterial; because the remedy was again given to the city by the revised statutes, as we shall have occasion to observe hereafter.

The *St.* of 1834, *c.* 151, is a general revision of the former acts, with some amendments. The second section contains an enumeration of rogues, vagabonds, and other idle and disorderly persons, (an enumeration somewhat enlarged by *St.* 1835, *c.* 54.) who are to be restrained, set to work and employed in the house of correction. It provides for the appointment of overseers and masters by the county commissioners, and by the mayor and aldermen of the city of Boston, respectively; it authorizes such

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overseers to discharge such vagrants within the time limited by the warrant for their commitment, if it appears to them that any such vagrant has reformed; it provides for the procuring of materials for work by the master, for the keeping and adjustment of his accounts, and for the payment of the balance by the person himself who has been committed and employed, or by his parent, master or kindred, or by the town in which he has a legal settlement; and it gives the master an action against such persons respectively, for the recovery of such balance.

The statute then goes on, with a distinct series of provisions relative to persons sentenced to the house of correction for any crime or offence, including boys under sixteen years of age, and females of any age liable to be punished by solitary imprisonment or hard labor. It provides that such convicts, when their term of solitary imprisoment has expired, may be employed, and an account kept of their labor; and if they earn more than enough for their own support, that they shall receive the surplus to their own use. It then provides, that all charges and expenses incurred in maintaining and employing such convicts, not reimbursed by their labor, shall be paid from the county treasury, the accounts being first examined and allowed, and that the county treasurer shall be allowed the same in his account with the Commonwealth; provided, however, that no allowance shall be made to the keeper of the house of correction for the board of any prisoner, committed under the second section, (vagrants,) if such person is of sufficient ability to support himself, or has a parent, master or kindred, able and liable, &c., or has a legal settlement in any city, town or district, in this Commonwealth.

This statute preserves the broad distinction, which runs through this whole series of enactments, between rogues and vagabonds — that class of vicious paupers who are sent to the work-house or house of correction, to be restrained and employed, and who are to be supported as paupers — and that class of persons convicted of crimes, who by force of particular statutes, instead of being sent to the state prison or county jail, as places of punishment, are sentenced to the house of correction. The expenses of this class are not to be reimbursed by the person himself, his kindred or town, but wholly and exclu

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sively by the Commonwealth; and in this respect he is not regarded or treated as a pauper.

Such, it is believed, was the state of the law when the revised statutes were passed. Of those sent to the house of correction, vagrants were regarded as paupers, and the expenses of their support paid like those of other paupers; and convicts, suffering under the sentence of the law, were regarded as criminals, whose support as such was rightfully chargeable to the Commonwealth.

The Rev. Sts. *c.* 143, substantially revive and reënact the same provisions. Section 5th enumerates rogues, vagabonds and persons guilty of various irregularities, vices and petty offences, who may be confined and employed in the house of correction. Section 16th, provides for the reimbursement of the master, after his account has been allowed and certified, by the person himself, by his parent or kindred, or by the town of his settlement, if any, and it authorizes him, after demand, to bring and maintain an action therefor; and it again in terms gives to the city of Boston the same remedies which are given to masters and keepers of houses of correction. The chapter then goes on, § 17, to provide for the punishment of convicts, especially boys and females, in the house of correction, for crimes and offences which are punishable, by the general laws, in the county jail or state prison. Section 27th provides, that all charges and expenses, not being reimbursed by the labor of the prisoner, shall be paid from the county treasury, the account being first allowed and certified by the county commissioners, and in Suffolk by the board of accounts; but not more than one dollar per week to be paid by the Commonwealth — but no allowance from the county treasury shall be made from the support of any prisoner, committed under the 5th and 6th sections, (vagrants,) when such person shall be of sufficient ability, or shall have either parent, master or kindred, who are able and obliged to maintain him, or who has a legal settlement within the State. Rev. Sts. *c.* 141, § 10, direct, that county treasurers shall render accounts, &c., and each county treasurer shall charge in his account all sums paid by him, pursuant to the order of the county commissioners, for the support of all prisoners whose

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support is chargeable to the Commonwealth. In the county of Suffolk, the treasurer of the city of Boston shall be county treasurer, and the board of accounts is charged with most of the functions, in regard to jails and houses of correction, which elsewhere pertain to county commissioners. Rev. Sts. *c.* 14, §§ 41, 47.

In order to come to the question, who are foreign paupers, we have thought it would be useful at least, if not necessary, to ascertain, by a review of the statutes, what classes of persons, who may by law be confined to houses of correction, are deemed paupers, and what class are, in the stricter sense, convicts, imprisoned by way of punishment for specific crimes.

The question proposed arises upon the construction of *St.* 1837, *c.* 238, § 3. It provides that all alien passengers, not subject to another and distinct provision, shall pay the sum of two dollars on landing, and the money so collected shall be paid into the treasury of the city or town, to be appropriated as the town or city government may direct, for the support of foreign paupers. By "foreign paupers," we understand all those persons coming within the general provisions of the poor laws, as persons standing in need of relief, who are incapable of supporting themselves, who have no parent or other kindred liable by law for their support, and who have no legal settlement in any city, town or district in the Commonwealth. And a person is not the less a pauper, who, if at large, would be able to support himself, but who, by reason of confinement, is compelled to depend on other means. *Wood* v. *Inhabitants of Burlington*, Middlesex, Oct. Term, 1840. (*Ante*, 489.)

Before coming directly to the question, it is necessary to consider the effect of one more act, *St.* 1839, *c.* 156, on which our opinion mainly depends. It provides that no allowance shall be made, by the Commonwealth, for the maintenance and support of any prisoner, in any jail or house of correction, after July 1st, 1839; but the expense of maintaining and supporting all such prisoners, as have no legal settlement in this Commonwealth, shall be borne by the county. This language is precise and explicit; and the term "prisoners," as there used, must extend to all persons committed to the house of correction,

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under process of law, and includes vagrants as well as convicts.

Regarding the distinction between the two classes of persons, who may by law be confined in houses of correction, and their mode of support, before this act of 1839, we are of opinion that the term "foreign paupers," as used in *St.* 1837, *c.* 238, § 3, does apply to that class of persons, who have been sent to the house of correction, under the laws respecting rogues and vagabonds, who are unable to support themselves, who have no parent or kindred bound for their support, and who have no legal settlement in the Commonwealth; and by the alien passenger act, (*St.* 1837, *c.* 238,) that part of the alien passenger fund, which accrued before July 1st, 1839, could rightfully be applied for the support of such persons, in the house of correction, by the city or town in which it was received; but no part of such fund could be so applied for the support of foreigners sentenced to imprisonment in the house of correction, as a punishment for other crimes and offences.

We are also of opinion, that no part of the alien passenger fund can be applied for the reimbursement of any expense, since July 1st, 1839, for the support of either of said classes confined in the house of correction.

By *St.* 1839, *c.* 156, the support and maintenance, in any house of correction, of all persons not having a legal settlement within the State, is made a direct and ultimate charge upon the county. If a vagrant, sent to the house of correction, has a legal settlement in the State, he is not a *foreign* pauper; if he has none, he is no longer, as formerly, to be relieved by towns, or by the State, according to the modes provided by law for the support of the poor, or to any analogous provisions, but to be supported like other prisoners, by the county, and consequently cannot be considered a pauper. In either case, therefore, the fund cannot be applied to the support of such persons, as "foreign paupers."

LEMUEL SHAW,
SAMUEL PUTNAM,
S. S. WILDE.

Boston, March 1, 184

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Persons who reside on lands purchased by or ceded to the United States for navy yards, forts and arsenals, and where there is no other reservation of jurisdiction to the State than that of a right to serve civil and criminal process on such lands, are not entitled to the benefits of the common schools for their children in the towns in which the lands are situated — nor are they liable to be assessed for their polls and estates to state, county and town taxes, in such towns — nor do they gain a settlement in such towns, for themselves or their children, by residence for any length of time on such lands — nor do they acquire, by residing on such lands, any elective franchise as inhabitants of such towns.

THE undersigned, justices of the supreme judicial court, have taken into consideration the several questions hereafter stated, upon which the honorable House of Representatives has requested their opinion, by an order passed 6th March, 1841; which questions are of the following tenor, viz:

1. Are persons residing on lands purchased by, or ceded to, the United States, for navy yards, arsenals, dock yards, forts, light houses, hospitals, and armories, in this Commonwealth, entitled to the benefits of the State common schools for their children, in the towns where such lands are located?

2. Does such residence exempt such persons from being assessed for their polls or estate, in the towns in which such places are located?

3. Will such residence, for the requisite length of time, give such persons or their children, a legal inhabitancy in such towns, or in the Commonwealth?

4. Are persons so residing entitled to the elective franchise in such towns?

Upon these questions the undersigned ask leave to submit the following opinion:

It is hardly practicable to give a general answer, applicable to all the cases proposed in the first question; because the question may depend somewhat upon the construction of the different acts, by which jurisdiction has been ceded by this Commonwealth to the United States, for various purposes, and these acts differ essentially from each other. For instance, in two acts, comparatively recent, one passed 4th March, 1826, (*St.* 1825, c. 181,) ceding to the United States a tract of land for the erection of a Marine Hospital in Chelsea, there is an express

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proviso and reservation, that all persons who may remove upon said territory, shall be deemed inhabitants of Chelsea, to enjoy the privileges, and subject to the duties of such inhabitants, except that they shall not be liable to serve on juries, or do military duty. Whereas, in the act passed February 20, 1828, (*St.* 1827, *c.* 66.) ceding jurisdiction to the United States of another tract in Chelsea, for the purpose of building a naval hospital, there is no such provision, and no reservation, except that, common to all those acts, of concurrent jurisdiction for the service of civil and criminal process. So, different regulations are contained in several acts ceding jurisdiction to the United States, for the purpose of building light houses, beacons, breakwaters, and the like. Perhaps a fuller and more careful analy sis would show, that when jurisdiction is ceded for the erection of forts, dock yards, and works of a purely military and naval character, connected with the defence of the country and operations of war, the exclusive jurisdiction is granted to the United States, with the single exception of service of process issuing under the authority of the State within which such territory is. Whereas, if the object of the cession of jurisdiction be of a civil nature, the assent of the State is limited and qualified by such reservations as the legislature, ceding the jurisdiction, may think expedient for the safety and convenience of their own citizens.

But we presume, from the nature and form of the questions, that it was not the intention of the honorable House to request an opinion upon all the various acts of cession, by which jurisdiction has been granted to the United States, from the establishment of the general government; these are numerous and various, and an examination of them would require much time and labor. We consider that the questions were intended to apply to the larger and more important establishments, as the navy yard in Charlestown, and the arsenal in Springfield.

The constitution of the United States, Art. 1, § 8, provides that congress shall have power to exercise exclusive legislation in all cases whatsoever, over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards and other

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needful buildings. The jurisdiction in such cases is put upon the same ground as that of the district ceded to the United States for the seat of government; and, unless the consent of the several States is expressly made conditional or limited by the act of cession, the exclusive power of legislation implies an exclusive jurisdiction; because the laws of the several States no longer operate within those districts.

The earlier and more important acts of this Commonwealth on this subject were that of 1798, *c.* 13, granting jurisdiction to the United States, of Castle Island and Governor's Island, in the harbor of Boston, and a tract of six hundred and forty acres in Springfield, for the purpose of erecting forts, magazines, arsenals, dock yards and other needful buildings, and *St.* 1800, *c.* 26, granting the consent of the Commonwealth to the United States, to purchase a tract of land in Charlestown, described, for the purpose of a navy or dock yard, or both, and erecting magazines, arsenals, and other needful buildings. The territory of the navy yard was somewhat extended by *St.* 1825, *c.* 8, but upon the same terms specified in the original act.

The only limitation or proviso in the act of 1800, granting the consent of this Commonwealth to the purchase of a tract of land in Charlestown for a navy yard and other purposes, is this: that the consent of the State is granted upon the express condition, that this Commonwealth shall retain a concurrent jurisdiction with the United States in and over the tract of land aforesaid, so far as that all civil, and such criminal process as may issue, under the authority of this Commonwealth, against any person or persons charged with crimes committed without the said tract, may be executed therein, in the same way and manner as though such consent had not been granted. The same provision is contained in *St.* 1798, *c.* 13, ceding jurisdiction over Castle Island for a fort, and over a tract of land in Springfield, for an armory and arsenal.

These provisions have been the subject of judicial consideration and decision in several cases. The leading cases on this subject in this State are *Commonwealth* v. *Clary*, 8 Mass. 72, and *Mitchell* v. *Tibbets*, 17 Pick. 298. Without stating these cases particularly, we are of opinion, that where the general

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consent of the Commonwealth is given to the purchase of territory by the United States, for forts and dock yards, and where there is no other condition or reservation in the act granting such consent, but that of a concurrent jurisdiction of the State for the service of civil process, and criminal process against persons charged with crimes committed out of such territory — the government of the United States have the sole and exclusive jurisdiction over such territory, for all purposes of legislation and jurisprudence, with the single exception expressed, and consequently, that no persons are amenable to the laws of the Commonwealth for crimes and offences committed within said territory, and that persons residing within the same do not acquire the civil and political privileges, nor do they become subject to the civil duties and obligations of inhabitants of the towns within which such territory is situated.

What would be the effect, were other conditions annexed to the act, granting the consent of the Commonwealth to the purchase of territory, and in terms reserving the full concurrent jurisdiction of the State; whether the consent would be deemed legally inoperative, or whether the condition and reservation would be void, or whether the jurisdiction would be deemed concurrent, we give no opinion.

We proceed to apply the opinion, thus stated, to the questions specifically proposed by the honorable House of Representatives.

1. We are of opinion that persons residing on lands purchased by, or ceded to, the United States for navy yards, forts and arsenals, where there is no other reservation of jurisdiction to the State, than that above mentioned, are not entitled to the benefits of the common schools for their children, in the towns in which such lands are situated.

2. We are of opinion that such residence does exempt such persons from being assessed for their polls and estates to state, county and town taxes, in the towns in which such places are situated.

3. Understanding as we do, by the terms of this question, that the term "legal inhabitancy," is used synonymously with "legal settlement," for the purpose of receiving support under

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the laws of the Commonwealth for the relief of the poor, we are of opinion that such residence, for any length of time, will not give such persons or their children a legal inhabitancy in such town.

4. We are also of opinion that persons residing in such territory do not thereby acquire any elective franchise as inhabitants of the towns in which such territory is situated.

LEMUEL SHAW,
SAMUEL PUTNAM,
S. S. WILDE,
CHARLES A. DEWEY.

Boston, March 10, 1841.

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ABANDONMENT.

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ABATEMENT.

1. Pendency of a libel, under the Rev. Sts. c. 76, § 6, for a divorce from bed and board for desertion, cannot be well pleaded in abatement of a libel for a divorce from the bond of matrimony for desertion, under the statute of 1838, c. 126. *Stevens* v. *Stevens*, 279.
2. Where a plea in abatement was filed at the return term, and was traversed by the plaintiff, but no issue was joined, and the defendant, at a subsequent term, filed a motion to dismiss the action, assigning various causes, and among them the cause assigned in his said plea; it was held that he had waived the exception taken in his plea, and that his motion was too late. *Kittridge* v. *Bancroft*, 508.
3. A motion to quash a writ or dismiss an action, for causes apparent on the face of the proceedings, (except want of jurisdiction in the court,) must be made at as early a stage of the case as is prescribed by law for the reception of pleas in abatement; that is, at the first term at which an appearance is entered by the defendant, and before a plea to the action. *Simonds* v. *Parker*. *Kittridge* v. *Bancroft*, 508.

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ACCOUNT.

See Auditor.

ACTION.

1. The provision in the Rev. Sts. c. 118, § 42, that "when any pecuniary forfeiture or fine is made recoverable by bill, plaint or information, it may nevertheless be sued for and recovered by an action of debt or an action of trespass on the case," relates only to forfeitures and fines to be prosecuted for in forms adapted to criminal proceedings, where the suit is brought by the Commonwealth, or by a common informer.

Wiley v. *Yale*, 553. *Colburn* v. *Swett*, 236.

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2. As a general rule, a common informer cannot maintain an action for a penalty, unless power is given to him for that purpose by statute.
Colburn v. *Swett*, 236.

3. The board of engineers of the fire department of the city of Boston, to whose use the penalties incurred by violation of *Sts.* 1833, *c.* 151, and 1837, *c.* 99, are made to enure, (except when any one of them shall be examined as a witness in the prosecution,) cannot authorize any person to sue for those penalties. *Ib.*

4. Since the passing of *St.* 1837, *c.* 99, and the repeal of the fourth section of *St.* 1833, *c.* 151, it seems that the only mode of enforcing the penalties imposed by those statutes, is by indictment, or suit in the name of the Commonwealth. *Ib.*

5. When an action is commenced and prosecuted by a corporation, by direction of its officers *de facto*, — no other persons claiming a right to act as its officers, — the defendant cannot be permitted to show, for the purpose of procuring the action to be dismissed, that those officers were illegally elected. (1 Hall, 191.)
Charitable Association, &c. v. *Baldwin*, 359.

6. A. & B. each brought an action against C. to try the same question of title to an undivided part of a tract of land. A.'s action was continued, by agreement of the parties thereto, to abide the decision in B.'s action, in which C afterwards obtained a verdict, and recovered judgment for costs against B. Thereupon A. submitted to a nonsuit in his action against C., and C. had judgment for costs. *Held*, that this latter judgment was not a bar to a subsequent action by A. for the same cause.
Ensign v. *Bartholomew*, 274.

7. County commissioners, having laid out a highway through a town, and across two channels of a stream, ordered the town to make an embankment, several rods from the highway, which should turn all the waters of the stream into one of its channels, and prevent the necessity of making more than one bridge in the highway. The town passed no vote, and did no act, on the matter; but the selectmen caused the embankment to be made, and paid for making it, by an order on the town treasurer. *Held*, that the town was not liable to an action by the owner of land which was flooded and injured in consequence of the making of the embankment. *Anthony* v. *Inhabitants of Adams*, 284.

8. A complaint against a member of a company of militia, to recover the penalty for neglect of military duty, is a civil action, within the meaning of the Rev. Sts. *c.* 87, § 11. *Belcher* v. *Johnson*, 148.

9. Where the facts stated in a report of the evidence of a trial, and conceded by both parties, show an objection to the maintenance of the action which cannot be removed by further proof, the court will consider such objection open, though it was not raised at the trial.
Slater v. *Rawson*, 450.

See Bank Bill. Promissory Note, 3. 4. Usury, 3.

ADDITION.

When in an indictment against a woman, she is described as A. B. "wife of C. D." these latter words are mere addition, or *descriptio personæ*;

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and it need not be proved, on the trial, upon the plea of not guilty, that she is such wife. If such addition be wrong, it must be excepted to by plea in abatement. *Commonwealth* v. *Lewis*, 151.

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See PRINCIPAL AND AGENT.

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See CONTRACT.

ALTERATION OF INSTRUMENTS.

If a bill or note is altered, after its execution, by extending the time of payment, it is a material alteration which discharges the party. The burden of proof, however, is on the defendant to show the alteration.
Davis v. *Jenney*, 221.

See EXCEPTIONS, 4.

AMENDMENT.

Where a plaintiff, in an action of trespass on the case, obtained a verdict for threefold the amount of interest taken of him by the defendant, on a usurious transaction, and the action was continued, on the defendant's motion for a new trial, until two years had elapsed after the cause of action accrued, and judgment was then arrested, on the defendant's motion, on the ground that the plaintiff should have brought an action of debt — the court refused to grant the plaintiff leave to amend by changing the form of his action, under the provisions of St. 1836, c. 273, § 3.
Wiley v. *Yale*, 553.

See COSTS, 3. 4.

ARBITRAMENT AND AWARD.

A submission was made to the arbitration of three persons, with an agreement that their award, or the award of a majority of them, should be final: All the arbitrators met and heard the parties, but after consulting together at different times, and not agreeing on an award, one of them told the others that he should not sit with them again: The two others afterwards met and made an award, without requesting the attendance of the third, or giving him notice. *Held*, that the award was valid.
Carpenter v. *Wood*, 409.

ARREST.

1. It is not necessary, in order to warrant an arrest under St. 1834, c. 167, and Rev. Sts. c. 90, § 111, that the oath therein required to be taken by the plaintiff or his agent, &c. should be indorsed on the writ.
Marsh v. *Bancroft*, 497.

2. Although in an action against an officer for not taking sufficient bail, a

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certificate of a justice of the peace, upon the writ, that the plaintiff has "made oath as the law requires to authorize the arrest of the defendant," is not evidence that the officer was authorized to arrest him; yet other evidence is admissible to prove that the proper oath was made by the plaintiff before such justice. *Ib.*

See SHERIFF, 2. 3.

ARSENALS.

See JURISDICTION.

ASSIGNMENT.

1. Where property is assigned, conformably to the *St.* of 1836, c 238, a creditor of the assignor cannot treat the assignment as void, and attach the property, on the ground that no creditor executed the assignment within a reasonable time, and before the attachment; nor because the property remains in the assignor's hands as agent of the assignee, and is neglected or mismanaged. The remedy of creditors, in such case, is against the assignee, under the provisions of § 7 of that statute.

Shattuck v. *Freeman*, 10.

2. An assignment made after the statute of 1836, c. 238, took effect, though not conformable to that statute, is not void, but voidable, as against the assignor's creditors. *Hopkins & Smith* v. *Ray*, 79.

3. When, under the authority given by such assignment, the assignees sell the assigned property, and take notes therefor on time, they cannot be held as trustees of the assignor, if summoned as such before the notes are payable. *Ib.*

4 A payment or assignment by a debtor, to one of his creditors, is not void as to his other creditors, under *St.* 1838, c. 163, § 10, unless it be made by the debtor in contemplation of becoming insolvent and obtaining a discharge under the provisions of that statute.

Gorham v. *Stearns*, 366.

5. The stock in trade of a debtor, who was insolvent, was attached by several of his creditors, and he afterwards, on the same day, but not then intending to take advantage of *St.* 1838, c. 163, nor even knowing there was such a statute, assigned to another creditor choses in action to secure what he owed him, and also to indemnify him against liabilities incurred on said debtor's behalf: On the next day, the debtor made application to a master in chancery for the benefit of said statute, and assignees of his property were afterwards duly appointed. *Held*, that the assignment to said creditor was not void as to the other creditors, within the terms of the tenth section of said statute. *Ib.*

See MORTGAGE, 6.

ASSUMPSIT.

1. After one tenant in common has obtained partition by legal process, he may maintain an action of assumpsit against his former cotenant to recover his share of the rent received by such cotenant on a demise by

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him of the whole estate, before and during the pendency of the process for partition; although such cotenant appeared and pleaded to the petition for partition that the petitioner was not seized of said estate as tenant in common thereof. *Munroe* v. *Luke*, 459.

2. A tenant in common of a moiety of an estate mortgaged the same after it had been attached by A.; and the mortgage was assigned to B.: A. levied execution on a fractional part of said moiety, and B. afterwards entered and took possession of the full moiety, demised the same, and received the whole rent until A. obtained partition by judgment: B. gave no notice to A. that he intended to hold the estate adversely to him; nor did he forbid A. to receive the rent: A. made no claim to any part of the rent, until after the validity of his levy was determined on his process for partition. *Held*, that there was not such an actual disseizin of A. as to prevent his recovering his share of the rents, in an action of assumpsit against B. *Ib.*

3. A. and B., tenants in common of land, sold the wood growing thereon, with a proviso that it should be taken from the land within two years. B. then conveyed his interest in the land to A. The purchaser of the wood transferred his right thereto to C., who had no notice of the proviso as to the time of taking it away. C. cut the wood, but did not remove it within two years. *Held*, that the property in the wood reverted to A., and that C. could not recover of him pay therefor, nor pay for cutting it. *Kemble* v. *Dresser*, 271.

4. A. sold and delivered lumber to B., no price being mentioned, under an agreement that it should be applied by B. towards payment of a debt due to him from A. for goods sold and delivered, and that the amount thereof should be deducted from such debt, on a settlement of accounts between the parties. B. afterwards sued A. for goods sold, and A. filed in offset his account against B. for the lumber. B. resisted the offset, and A. thereupon, by leave of court, withdrew his said account, and B took judgment for the full amount of his claim against A. *Held*, that A. might well maintain indebitatus assumpsit against B. to recover pay for the lumber. *Bemis* v. *Charles*, 440.

5. Assumpsit on a *quantum meruit* cannot be maintained by a city or town, against one who enters his particular drain into a common sewer of the city or town. *City of Boston* v. *Shaw*, 138.

6. The mate of a vessel, that was lying at Mobile, found two bales of cotton floating in the river there, took them from the water, put them on board the vessel and brought them to Boston, where the owners of the vessel agreed with him to take the cotton into their possession, and to be accountable to him for it, if they could not discovor the owner thereof. They sold the cotton soon afterwards, and no owner appearing, the mate, after four years, demanded a settlement which was refused. *Held*, that he was entitled to recover of them the proceeds of the sale.

Ellery v. *Cunningham*, 112.

7. *Held* also, that he could recover interest only from the day when he demanded an account, they being his factors, and being, under the circumstances of the case, in no default before that day. *Ib.*

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8. Several members of an unincorporated religious society mutually agreed in writing to take and pay for the number of shares affixed to their names, in the stock of a meetinghouse which they proposed to build, and to pay a certain sum on each share to such person as the majority of share holders present at a meeting to be held for that purpose should elect as treasurer; such treasurer to give bond, with sureties, for fidelity, &c., and to pay over the money received by him to the treasurer that should be elected by the share holders when they should be organized under an act of incorporation which they intended to obtain. A. subscribed for shares in said stock, and B. was chosen treasurer, and gave bond as provided for in said agreement of the subscribers The subscribers afterwards obtained an act of incorporation, organized under it, and chose C. treasurer. A. refused to pay the sum which he had subscribed, and B. brought an action against him to recover the same. *Held*, that there was a sufficient consideration for A.'s promise, and that the action thereon was rightly brought by B. *Thompson* v. *Page*, 565

ATTACHMENT.

1 An attachment of real estate is valid, as against all persons except subsequent purchasers and attaching creditors, although no notice thereof be deposited in the office of the clerk of the court. *Coffin* v. *Ray*, 212.

2. *Qu.* whether trees and shrubs — rooted in land used as a nursery garden, for the purpose of being taken up and sold at certain seasons of the year — can be taken on attachment and removed, or be attached without an actual seizure and taking of possession?

Miller v. *Baker*, 32.

ATTESTING WITNESS.

See WILL. LIMITATIONS, 1.

ATTORNEY.

See DIVORCE. REVIEW, 2.

AUDITOR.

1. The court is not authorized by Rev. Sts. c. 96, § 25, to appoint an auditor, without the consent of both parties, "to examine vouchers, state accounts," &c. in an action against an officer for not attaching or levying upon certain enumerated articles of personal property, although the articles are small and very numerous, and the examination of the evidence concerning them, before a jury, must necessarily require much time. *Whitwell* v. *Willard*, 216.

2. An "account," within the meaning of Rev. Sts. c. 96, § 25, relates to some matter of debt and credit, or to demands in the nature of debt and credit, between parties, and implies that one is responsible to another on the score of contract or of some fiduciary relation. And the term "voucher," designates an account book in which charges and acquittances are entered, or some acquittance or receipt discharging a person, or being evidence of payment. *Ib.*

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AUTREFOIS ACQUIT OR CONVICT.

See INDICTMENT, 4.

BAIL AND BAIL BOND.

See ARREST, 2. PLEADING, 5. SHERIFF, 3.

BANK BILL.

If a creditor actually receives bank bills of his debtor, though he protests that he will not receive them unless the difference between their value and that of specie shall be allowed to him, and the debtor refuses to make, or to promise to make, such allowance, the creditor cannot maintain an action to recover the amount of such difference.

Phillips, Judge, v. *Blake.* 156.

See PROMISSORY NOTE, 4.

BAR.

See ACTION, 6. INDICTMENT, 4.

BAWDY HOUSE.

See HUSBAND & WIFE, 5.

BOND.

1. A subsequent attaching creditor, on being admitted by the court of common pleas, under St. of 1823, *c.* 142, to defend an action brought by a prior attaching creditor, filed a bond for the payment of all such costs and damages as *said court* should adjudge and decree to have been occasioned by such defence to be so made. The action was afterwards brought, by appeal, into this court, where defence was made but did not prevail. Judgment was thereupon rendered against the defendant for the plaintiff's full demand and for costs, and execution was sued out thereon and returned satisfied in part only, the defendant being insolvent. No adjudication respecting costs, &c. was made by the court of common pleas. *Held,* that the plaintiff's only remedy was by suit on the bond, after an adjudication, as to costs and damages, by the court of common pleas; and that he had waived this remedy by taking his said judgment against the original defendant. *Whitwell* v. *Burnside,* 39.
2. In computing the time within which a prisoner in execution must surrender himself to close confinement, when he gives bond, pursuant to Rev. Sts. *c.* 97, § 63, with condition that "if he shall not be lawfully discharged within ninety days from the day of his commitment, he will surrender himself," &c., the day of commitment is to be excluded. And as such prisoner has the whole of the ninety days, thus computed, to obtain his discharge, the condition of his bond is saved, if he surrender himself on the ninety-first day. *Wiggin* v. *Peters,* 127.
3. A bond with condition that the prisoner "shall, at the expiration of ninety days from the day of his commitment, surrender, &c., unless he shall before that time have been lawfully discharged," is of the same

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legal effect as a bond with condition in the precise terms prescribed by the Rev. Sts. c. 97, § 63. *Ib.*

See PRINCIPAL AND SURETY, 2. 3. REPLEVIN.

BOUNDARIES.

1. Where a deed, conveying land, is of doubtful construction as to the boundaries, the construction given by the parties themselves, as shown by their acts and admissions, is deemed to be the true one, unless the contrary be clearly shown. *Stone* v. *Clark*, 378.

2. Where a deed of a lot, in an extensive tract of wood-land, described it as "running south by T.'s farm, so far as to include 150 acres"; it was held that the jury were authorized to extend the line of the land conveyed beyond the southerly line of T.'s farm, where the other boundaries, which were established by satisfactory proof, and the whole description of the granted premises, clearly showed that the recital of T.'s farm, as the extent of the southern boundary, was a defective and imperfect description of that boundary. *Slater* v. *Rawson*, 450.

See EVIDENCE, 5-8. FLATS, 1.

BROKER.

See EVIDENCE, 14. PRINCIPAL AND AGENT, 2.

BURDEN OF PROOF.

See ALTERATION. EVIDENCE, 11. SLANDER.

BY-LAW.

A by-law of the city of Boston, requiring that every person, who enters his particular drain into a common sewer of the city, shall be held to pay to the city such sum as is his just proportion of the expense of making such common sewer, having reference always to the last valuation of such person's estate, in the assessors' books, previous to the expenditure, is void for inequality and unreasonableness.

City of Boston v. *Shaw*, 130.

See ASSUMPSIT, 5.

CASE STATED.

See EVIDENCE, 1.

CERTIORARI.

1. Where parties, interested in the alteration of a street or highway, had actual notice of the proceedings, and attended and were heard concerning them, and have acquiesced therein for many years, a writ of *certiorari* to remove those proceedings will not be granted merely because it does not appear that they had the official notice prescribed by law; nor because one of them was *non compos mentis*, and had no guardian.

Hancock v. *City of Boston*, 122.

2. Where a town has due notice of the application of individuals to the

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county commissioners for the alteration of a road within the town, alleged, in such application and in all the proceedings thereon, to be a highway, and also has due notice of the proceedings of the commissioners in directing specific repairs to be made on said road by the town, and does not object that said road is a town way and not a highway, until after the commissioners have caused such repairs to be made upon the neglect of the town to make them as ordered, and after the town is served with notice to show cause why a warrant of distress should not issue against the inhabitants of the town for the collection of its proportion of the expense of such repairs; a writ of *certiorari* will not be granted to remove the records of the commissioners, on the ground that the road was a town way, and that they therefore had no jurisdiction. Nor will a writ of prohibition be granted to restrain the commissioners from issuing such warrant of distress.

Inhabitants of Whately v. *County Commissioners*, 336

CHANCERY.

See EQUITY.

CITY.

See PLEADING, 2. 4.

COLLECTOR.

See EVIDENCE, 12. TAX, 4. 5.

COMMON INFORMER.

See ACTION, 1. 2.

COMMON LAW.

See HUSBAND AND WIFE, 2.

COMMON SEWER.

See BY-LAW.

CONSTRUCTION.

Of Contracts — See CONTRACT, II.

Of Wills — See WILL, 6. 9 — 12.

CONTRACT.

I. *Consideration.*

II. *Construction.*

III. *Rescinding.*

I. *Consideration.*

1. A promise, by the holder of a joint and several note, to one of the makers who had made part payment thereof, that he would look to the other maker for payment of what remained due thereon, is without considera-

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tion, and furnishes no defence to an action against the maker, to whom such promise was made, to recover the remainder of the note.

Smith v. *Bartholomew*, 276.

2. The payment of a debt by a debtor, the same being due and payable, is not a sufficient consideration to support a promise. *Ib.*

3. A promise to pay a demand which the promisee had voluntarily released for the purpose of rendering the promisor a competent witness in a suit against the promisee, is without consideration, and an action thereon cannot be sustained. After such release, there is no such moral obligation to pay the demand, as will support a promise to pay.

Valentine v. *Foster*, 520.

4. This promise, "I agree with A. to give up his note for the W. stock, and allow him in account the sum paid thereon, depending on his exertion to free me from that concern without further loss," is on a sufficient consideration, if, when it was made, there was a possible liability of the promisor to further loss from the concern mentioned.

Hubbard v. *Coolidge*, 84.

See Assumpsit, 8. Limitations, 1. Promissory Note, 2.

II. *Construction.*

5. It was agreed between A. and B. that if A. would, at his own expense, complete a certain machine which he had projected, and satisfy B., by trial thereof, that it would save one fourth, or more, of the expense then incurred by B. in a certain manufacturing process, B. would pay A. twelve per cent. on the actual savings made by said machine. A. built the machine in B.'s warehouse; but B. in fact paid all the expenses of building it, including the labor of A. thereon. B. used the machine, and the savings made by the use thereof more than repaid him the expense of constructing it. *Held*, that the machine was the property of B.

Boston India Rubber Co. v. *Hoyt*, 139.

6. This writing, "I agree with A. to give up his note for the W. stock, and allow him in account the sum paid thereon, depending on his exertion to free me from that concern without further loss" constitutes a conditional promise, and the acceptance thereof by A. is an undertaking by him to use his exertion, &c. on request. *Hubbard* v. *Coolidge*, 84.

7. W. agreed with a town "to support all the town and state paupers, who have or shall have their legal settlement in said town, for and during the term of five years; to pay all funeral expenses of said paupers, and be at all the expense of transporting and removing; and to pay all other expenses whatever, that may arise concerning the expense of said paupers, except that of ascertaining their legal settlement." *Held*, that W. was bound to pay the expense incurred by the town for the support, in the house of correction in the city of Boston, of a person whose legal settlement was in said town. *Held* also, that W. was bound to pay the costs incurred by the town, in a suit by the city of Boston to recover for the support of such person; the town having given W. notice of the claim of said city. *Wood* v. *Inhabitants of Burlington*, 489.

8 A promise that one shall receive a certificate of ten shares of the cor-

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porate stock of a certain manufacting company whose capital shall be one hundred thousand dollars, divided into not more than two hundred shares, is not fulfilled by a tender of a certificate of ten shares of the stock of said company, of which only thirty-five thousand dollars are paid in, divided into seventy shares. *Dyer* v. *Rich*, 180.

See COVENANT, 3. MORTGAGE, 1. 2.

III. *Rescinding.*

9. Where goods are sold and delivered, and the seller afterwards agrees to receive in payment therefor the note of a third person, indorsed by the payee and another, and the buyer delivers such third person's note, on which the promised indorsements are forged, the seller cannot, upon discovering the forgery, maintain an action against the buyer, for goods sold and delivered, until he has rescinded the agreement and returned, or offered to return, the note. *Coolidge* v. *Brigham*, 547.

10. A contract cannot be rescinded by one of the parties for the default of the other, unless both of them can be put in the same state as before the contract. It must be rescinded *in toto*; and if the party rescinding has received property of any value, however inconsiderable, under the contract, he must restore it to the other party. *Ib.*

See TROVER, 2.

CONTRIBUTION.

See EQUITY, 7. LIMITATIONS, 3.

CORONER.

Though it do not appear on the face of a writ, which is directed to and served by a coroner, that he had authority to serve it, yet if the contrary do not appear, and the defendant do not take the exception at the term when he enters his appearance, he cannot take it afterwards. *Kittridge* v. *Bancroft*, 506.

CORPORATION.

See ACTION, 5. EQUITY, 1. 2. NOTICE.

COSTS.

1. Where, in an action of slander, the declaration contains two counts alleging the utterance of similar words at different times, and a verdict is returned for the plaintiff, on one count, and for the defendant on the other, the counts are not on several and distinct causes of action, so as to entitle the defendant to costs, within the true meaning and intention of Rev. Sts. *c.* 121, § 16. *Sayle* v. *Briggs*, 291.

2. Under the Rev. Sts. *c.* 121, § 36, actual travel of a party to a suit, who resides without the State, can be taxed only from the line of the State, in the usual route from his residence to the place where the court is held. *White* v. *Judd*, 293.

3. When judgment is arrested after verdict, and leave to amend and a new trial are granted, costs are allowed to the defendant from the time the case went to the jury. *Carlisle* v. *Weston*, 26.

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4. Where a new trial was granted, with liberty to the plaintiff to amend his declaration by filing a new count conformable to the evidence, the plaintiff was ordered to pay the defendant his costs of the former trial, and of the term when the new trial was granted.
Coolidge v. *Brigham*, 553.

5. Under the Rev. Sts. c. 35, § 2, a plaintiff, who recovers only the balance of his claim, after a deduction of the forfeiture incurred by him for reserving or taking usurious interest thereon, is not entitled to costs; and a judgment, in such case, for his damage and costs, is erroneous, and will be reversed as to the costs. *Mansur* v. *Wilkins*, 488.

See Bond, 1. Equity, 6. Exceptions, 5. Husband and Wife, 4. Trustee Process, 3.

COUNTY COMMISSIONERS.

See Town.

COVENANT.

1. If a grantor of land is not seized thereof when he makes his deed of conveyance, his covenant of warranty does not attach to the land and run with it; and he, therefore, is not liable to an action, by the assignee of his grantee, for breach of such covenant. *Slater* v. *Rawson*, 450.

2. Where an assignee of a grantee, in an action of covenant against the grantor, avers and proves that the grantor had neither seizin nor title, at the time of his grant, the grantor is not estopped to rely on his want of seizin as a defence to the action on the covenant of warranty. *Ib.*

3. In a deed conveying real estate, the grantor, after a description thereof, added that it was sold subject to the right of the widow and daughter of B. in the same — the daughter's "right to exist no longer than the widow occupies the premises to which she is entitled under said B.'s will" — and covenanted that the premises were free from all incumbrances except the above mentioned. By the will of B., the daughter had a right after the widow's death, in the estate conveyed. *Held*, that the grantor was liable to the grantee, in an action on the covenant against incumbrances. *Jarvis* v. *Bullrick*, 480.

See Mortgage, 1 — 3. Pleading, 3. Request.

CREEK.

See Flats, 1.

DAMAGES.

1. In an action on a warranty that the indorsements on a note of a third person, which was transferred by the defendant to the plaintiff, were genuine, the measure of damages is the difference between the amount of the note and its actual value. *Coolidge* v. *Brigham*, 553.

2. Where the contract was, that the plaintiff should receive a certificate of ten shares of the stock in a manufacturing company, whose capital

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should be 100,000, divided into not more than two hundred shares, and a certificate was tendered of ten shares of the stock of said company, of which only $ 35,000 were paid in, divided into seventy shares; it was held that the rule of damages for breach of this contract was the value of ten shares in the full capital stock, if it had been made up at the time stipulated, and the company had been then ready, in good faith, to operate upon such capital, pursuant to their charter. *Dyer* v. *Rich*, 180.

3. In an action of trover, the rule of damages is the value of the goods, at the time of conversion, and interest thereon from that time.

Johnson v. *Sumner*, 172.

See TRUST.

DEBT.

See USURY, 3.

DECEIT.

1. Fraud in the defendant, and damage to the plaintiff, are the gist of the action for a deceitful representation that a third person is entitled to credit. *Tryon* v. *Whitmarsh*, 1.

2. Such action is not supported by mere proof that the representation was unwarranted and groundless. It must also be proved, that the defendant did not believe his representation to be true. *Ib.*

DECREE OF DISTRIBUTION.

A decree of distribution, made by a probate court, after such notice as is prescribed by statute, or, if no statute require notice, after such notice as the court, in its discretion, shall think proper to order, is so far conclusive as to protect an administrator, acting in good faith, in conforming to it. *Loring* v. *Steineman*, 204.

A decree of distribution is not to be made in the general terms, used in the Rev. Sts. c. 60, to designate the heirs at law of an intestate, viz. "his brothers and sisters, and the children of any deceased brother or sister" &c.; but the probate court is to ascertain who are the existing individuals entitled to distribution, and decree distribution to them by name. *Ib.*

DEED.

See BOUNDARIES. EVIDENCE, 4. 7. COVENANT, 3. HUSBAND AND WIFE, 1. 3.

DEMAND.

See PLEADING, 6. PROMISSORY NOTE 3. 4. TAX, 5.

DEMURRER.

See EQUITY, 5. 6.

DEVISE.

See REVERSION. WILL, 8—12.

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DISSEIZIN.

The levy of an execution on land which is not the judgment debtor's does not work such a disseizin of the true owner, as will prevent his maintaining an action of trespass, without reëntry, against the judgment creditor or those acting under him. *Blood* v. *Wood*, 528.

An execution was levied on land not the judgment debtor's, being part of a large unenclosed meadow, and the judgment creditor entered thereon two or three times for the purpose of showing the grass for sale, but took no actual possession: He afterwards advertised a sale of the grass, in a public newspaper, as grass growing on his land, and caused the same to be sold at auction, at a distance from the land, and the purchaser thereof cut and carried it away — the true owner of the land having no actual notice of the proceedings. *Held*, that these acts did not constitue such a disseizin or ouster of the true owner, as to prevent his maintaining an action of trespass against the purchaser of the grass. *Ib.*

See Assumpsit, 1. 2. Writ of Entry.

DIVORCE.

Under the Rev. Sts. c. 76, § 12, a libel for a divorce, filed by a libellant of sound mind, &c., cannot be sustained, if it be signed by his attorney, although the attorney was specially empowered by him to sign it.

Gould v. *Gould*, 382.

See Husband and Wife, 4.

DOG.

The provision in the Rev. Sts. c. 58, § 12, that any person may kill any dog, being without a collar, does not authorize a person to convert such dog to his own use; and a person, so converting such dog, is liable to the owner thereof, in an action of trover. *Cummings* v. *Perham*, 555.

DOMICIL.

See Tax, 1. 2.

DOWER.

1. A testator devised to his wife all his property, during her widowhood, subject to his debts and the legacies bequeathed by him, and appointed her his executrix. He also authorized her, during her widowhood, to sell and convey so much of his real estate as she might judge necessary and expedient for payment of his debts, and for her support and that of her children, and for their education. She accepted the trust of executrix and administered upon the estate. She sold, within two years, part of the real estate, under the authority in the will, and shortly after married again. After her second marriage, she sold the residue of the real estate, for payment of debts, under a license of court, and executed deeds thereof, in which her husband joined, making no reservation therein of her right of dower, and being under no misapprehension concerning the condition of the estate. Thirteen years after the death of

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her second husband, she first claimed dower in the estate sold under said license. *Held* that she had accepted the provision made for her in the will, and that her claim to dower was thereby barred.

Delay v. *Vinal*, 57.

2 A woman is "deprived of the provision made for her by will, in lieu of dower," within the meaning of the Rev. Sts. c. 60, § 13, and is entitled to be endowed, if all the property of the testator is taken, or required, for the payment of his debts. And she is thus entitled, in such case, where the provision is by devise of all the testator's property, on condition that she pay all his debts, legacies, &c. as well as when the provision is by bequest of a certain sum of money, or of specific property

Thompson v. *McGaw*, 66.

3. It is no objection, in such case, to an application to a probate court for an assignment of dower, that a previous application had been made and refused, before there was sufficient evidence that the petitioner would be deprived of the provision in the will, and that she did not appeal from the decree of refusal. *Ib.*

DRAIN OR SEWER.

See ASSUMPSIT, 5. BY-LAW.

ELECTIVE FRANCHISE.

See JURISDICTION.

ENGINEERS OF FIRE DEPARTMENT.

See ACTION, 3.

EQUITY.

1. A member of a corporation, though not an officer or agent thereof, may rightly be made a party to a bill in equity against the corporation and individuals, for discovery and relief, and is bound to answer, on oath, so much of the bill as seeks for a discovery of matters affecting the corporation. *Wright* v. *Dame*, 237.

2. It is not necessary that such bill should aver that the member of the corporation, who is thus made defendant, has any information which is not possessed by other members thereof; nor need the bill assign any special reason for requiring such defendant to make the discovery prayed for. *Ib.*

3. A supplemental bill ought not to be filed as a matter of course, but only by leave of the court upon sufficient cause shown; and the supplemental matter must be verified by affidavit, or other satisfactory proof.

Pedrick v. *White*, 76.

4. To warrant the filing of such bill, it should be shown to the court, either, 1st. That the matter relied upon as supplemental, arose after the original suit was commenced; or 2d. That the facts relied upon first came to the plaintiff's knowledge, or were made known to him in such a manner that he could avail himself of them, after the cause had passed the stage in which he might have had leave to amend; or 3d. That the plaintiff has been

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prevented, through inadvertence, misapprehension, &c. of himself, or his agents or counsel, or other cause satisfactorily shown, from availing himself of the proposed matter of his supplemental bill, at an earlier stage of the cause. *Ib.*

5. Where a bill for discovery and relief is filed against a party who is not liable to a decree for relief, but is bound to make discovery, a demurrer by him to the whole bill will be overruled: He should demur only to that part of the bill which seeks relief. *Wright* v. *Dame*, 237.
6. After a demurrer of record, to the whole bill, is overruled, the defendant may demur *ore tenus* to the part of the bill which is demurrable, and such demurrer will be allowed. But he will not be allowed his costs. (See *St.* 1841, *c.* 129.) *Ib.*

One of two sureties, who has paid the debt of the principal, and files a bill in equity, for contribution, against the heirs of his co-surety, and causes all of them, who are within the reach of process, to be summoned, is entitled, by the Rev. Sts. *c.* 70, to a decree against them severally for such equal sums as amount, in the aggregate, to a moiety of what he has thus paid, though there are other heirs who are not summoned. *Wood* v. *Leland*, 387.

8. If one of such heirs, thus summoned, die pending the suit, his administrator is to be summoned in, and the same decree will be passed against him, that would have been passed against his intestate. *Ib.*

See LIMITATIONS, 3.

ERROR.

See COSTS, 5.

ESTATE TAIL.

See HUSBAND AND WIFE, 3. REVERSION.

ESTOPPEL.

1. Where a party to a written agreement to pay money, &c. recites therein, as the consideration of his promise, that the promisee had made a conveyance, of even date with said agreement, to a third party, the promisor is estopped to object, for the purpose of showing that such conveyance was inoperative and not a good consideration for his promise, that it was not made until a subsequent day, although such conveyance may in fact bear date of a subsequent day. *Dyer* v. *Rich*, 180.
2. A petitioner for a review, on the ground that he had no notice of the suit in which judgment was rendered against him, is not estopped to disprove the return of notice on the original writ, nor to show that his appearance of record, at the return term, was entered without his request or knowledge. *Brewer* v. *Holmes*, 288.
3. Where, at the first trial of a cause, a party sets up a conveyance as a mortgage, and it is decided that such conveyance is absolute, he is not estopped to rely on it as absolute, at a second trial. *Miller* v. *Baker*, 27.

See COVENANT, 2. PRINCIPAL AND SURETY, 3.

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EVIDENCE.

1 In deciding a case stated by the parties, where the statement sets forth the testimony of witnesses, the court must take such testimony to be true. *Gorham* v. *Stearns*, 366.

2. When a person leaves his usual home and place of residence, for temporary purposes, and is not heard of, or known to be living, for the term of seven years, the legal presumption is that he is dead.
Loring v. *Steineman*, 204.

3. A notice to a party to produce a paper in his possession is sufficient to authorize the admission of parol evidence of the contents thereof, if such notice be so framed that the party cannot doubt what paper is meant. *Bemis* v. *Charles*, 440.

4. Parol evidence of the practical construction given to a deed, by the parties thereto, is admissible when the language thereof — especially in the description of the land conveyed — is doubtful.
Stone v. *Clark*, 378.

5. When the proprietors of adjoining lots of land agree upon a dividing line between them, the presumption is, that it is the true line according to the original location of the lots. *Sparhawk* v. *Bullard*, 95.

6. For the purpose of establishing the location of demanded premises, grants of adjacent lands, between strangers, are admissible and relevant evidence. *Ib.*

7. An ancient location of flats adjacent to the flats demanded, by description in a deed between third persons, though unaccompanied by any open and notorious possession, will govern the line of the demanded premises, unless the party objecting can prove that the line ought to have been laid out in a different direction. *Ib.*

8. In the case of a grant of land with the flats belonging thereto, the tenant may show what flats belonged to the land, or that the demanded premises were not included in that grant. *Ib.*

9. On the trial, in the court of common pleas, of an appeal from a justice of the peace, a defendant cannot, under the Rev. Sts. c. 85, give in evidence, as a defence, his title to real estate, unless it appear by the pleadings, or by a statement on the justice's record, that such title was concerned or brought in question before the justice.
Hunt v. *Wilson*, 309.

10. In the trial of an action of slander for charging the plaintiff with stealing a deed, made to him by the defendant, of a certain farm, the defendant, in order to prove the truth of the charge, gave evidence (*inter alia*) that the plaintiff, on being charged by the defendant with stealing the deed, took the deed from the register's office, and reconveyed the farm to the defendant; and that there was a recital, in the deed of reconveyance, respecting "the improper delivery," &c. of the former deed. *Held*, that the plaintiff was rightly permitted to prove, by way of rebutting the inference which might be drawn from the evidence aforesaid, that one of his friends advised him to make the deed of reconveyance, for the purpose of avoiding the expense of a lawsuit.
Sperry v. *Wilcox* 267.

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11. In an action by the indorsee against the maker of a negotiable note the burden is on the defendant to prove that the note was negotiated after it was due and dishonored; and that burden is not removed by proof that the note was transferred and delivered to the plaintiff before it was dishonored, but was not indorsed until afterwards.

Ranger v. *Cary*, 369.

12. Where a collector of taxes died, leaving the tax of A. uncancelled on the tax list, and apparently unpaid, and the assessors committed said list to another person for collection, who took and sold A.'s property to pay said tax, and A. brought an action against one of the assessors to recover damages for such taking and sale, on the ground that said tax had been in fact paid to the deceased collector; it was held that the deceased collector's admissions, in conversation with third persons, that said tax had been paid, were not admissible in evidence.

Lawrence v. *Kimball*, 524.

13. In an action to try the question whether the plaintiff, who had left the country with his family, was liable afterwards to be taxed as an inhabitant of the place of his former residence, a letter from him to his agent in that place, expressing his intention to reside abroad permanently, is admissible in evidence, if written before he knew that a tax had been assessed upon him, though written after the assessment. *Aliter*, it seems, of such letters written after he knew that he was taxed.

Thorndike v. *City of Boston*, 242.

14. In an action against one for selling a note which he had fraudulently procured to be indorsed by a minor, the plaintiff may give evidence of the declarations, made at the time of the sale, by the broker whom the defendant employed to sell the note, concerning the character of the note and the parties thereto. *Lobdell* v. *Baker*, 193.

15. Where, in the trial of such action, evidence was admitted, that the defendant was a man of sudden impulses, and that, within two or three minutes after procuring such indorsement, he expressed his regret that he had so done; an exception to the admission of such evidence was held not to be well founded. *Ib.*

16. In an action against a town to recover damages sustained by reason of a defect in a road, reports of committees appointed by the town to inquire into the facts of the case, and votes of the town accepting such reports, are not admissible in evidence against the town, if such reports do not set forth facts which show the liability of the town, and if such votes neither acknowledge any liability nor direct any settlement with the plaintiff at the town's expense.

Dudley v *Inhabitants of Weston*, 477.

See Action, 5. 9. Addition. Arrest, 2. Deceit, 2. Review, 2. Slander. Trespass. Will, 2. 3. Writ of Entry.

EXCEPTIONS.

1 Exceptions may be filed, it seems, by either party, on the trial of a libel sued as a process *in rem* for a forfeiture.

Barnacoat v. *Gunpowder*, 225.

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2. Exceptions must be confined strictly to matters of law. It cannot properly be stated, in a bill of exceptions, that certain facts were proved; nor can the court consider the evidence stated in a bill, with a view to set aside a verdict; nor can they found any decision on facts there stated, and not embraced in the issue, or otherwise appearing on the record. *Ib.* S. P. *French* v. *Bancroft*, 502.

3. The comment of a judge upon evidence, not involving any opinion or direction in matter of law, is not a proper ground of exception. *Davis* v. *Jenney*, 221.

4. In a suit against the drawer of a bill of exchange drawn for his accommodation, the defence was, that the bill had been altered so as to be payable in sixty days, instead of six; and the only evidence of alteration was on the face of the bill. The judge, after instructing the jury that the question was to be decided upon inspection, also instructed them to consider the probability or improbability that an accommodation bill would be made payable in six days. *Held*, that no exception could be well taken to this last instruction. *Ib.*

5. Where issue was joined on the plea of not guilty to a libel for a forfeiture of gunpowder, under St. 1833, c. 151, and the jury found the respondent not guilty, but also found that the gunpowder was had, kept, and possessed contrary to law, &c, and the judge decreed the gunpowder forfeit, but refused to adjudge that the respondent should pay the costs of the prosecution; and the libellants filed exceptions to such refusal, and set forth the evidence in the bill of exceptions; the exceptions were overruled, and judgment affirmed. *Barnacoat* v. *Gunpowder*, 225.

6. Under the Rev. Sts. c. 138, §§ 11–14, this court has authority, in criminal cases brought here from the court of common pleas and municipal court upon exceptions, to grant a new trial, for other sufficient cause shown, after overruling the exceptions; or to remand the cause to the court of common pleas, &c., for the purpose, among others, of their hearing a motion for a new trial. *Commonwealth* v. *Peck*, 428.

See Action 9.

EXECUTION.

1. In the levy of A.'s execution, appraisers set off twenty-two acres of the judgment debtor's land subject to a supposed life estate of S. in one half thereof, S. having no estate therein, and deducting from the appraised value of the land the amount of such supposed incumbrance: B. afterwards caused an execution against the same judgment debtor to be levied on the land, appraised at its value as an unincumbered fee simple. In an action by B. against A. to recover possession of said land, it was held that he was entitled to recover, as A.'s levy was vitiated by the proceedings of the appraisers. *Held* also, that A. could not support his levy against the levy of B. by showing that at the time when both executions were levied, the judgment debtor in fact owned only eight acres of the land as an unincumbered fee, and had only an estate during the life of L. in the remaining fourteen acres. *Root* v. *Colton*, 345

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2. Where a first attaching creditor made a levy, by metes and bounds, on the land of a tenant in common, who had the right of taking his share where he should select, and the part thus levied on was afterwards, on a process of partition, assigned to such tenant in severalty, at his request the levy was held to be valid against all conveyances and attachments subsequent to the first attachment. *Brown* v. *Bailey*, 254.

3. An administrator suffered judgment to be rendered against himself, in an action brought for his own benefit in the name of another, and, in the levy of the execution upon the intestate's estate, acted both as defendant and as agent of the nominal plaintiff. *Held*, that the proceedings were unwarrantable and collusive, and that such levy was void as against another creditor of the intestate who made a regular levy on the same estate. *Goddard* v. *Divoll*, 413.

4. Though a second grantee have notice of a prior unregistered deed of the land conveyed to him, yet his creditors are not affected by his knowledge thereof; and if they without knowledge of such deed attach the land as his, and levy thereon, they will hold it against the first grantee; although they may have such a knowledge before levy of execution. (5 Greenl. 369. 3 Fairfield, 148.) *Coffin* v. *Ray*, 212.

5. A levy of execution on land of the judgment debtor vests in the creditor an actual seizin. *Munroe* v. *Luke*, 462. *Blood* v. *Wood*, 534.

See Disseizin. Husband & Wife, 4. Sheriff, 2.

EXECUTOR AND ADMINISTRATOR.

1. If an administrator suffers judgment to be recovered against him before he represents the deceased's estate insolvent, he must pay the full amount of such judgment, without regard to the assets of the deceased. And if, on demand made upon him to pay such judgment, or to show sufficient property of the deceased to be taken in execution to satisfy the same, he neglects or refuses so to do, he and his sureties are liable, on his administration bond, to a suit by the judgment creditor, in the name of the judge of probate, although the deceased's estate is in fact insolvent. *Newcomb, Judge*, v. *Goss*, 333.

2. An administrator who pays in full a claim against the estate of his intestate, under the belief that the estate is solvent, cannot recover back any part of the sum so paid, unless he proves the insolvency of the estate by a commission of insolvency duly issued, executed and returned, and a dividend decreed by the probate court: Hence it was held that an administrator could not recover in such case, where the commissioners of insolvency returned a list of claims allowed by them after the expiration of the time limited in their commission, although the judge of probate had ordered a dividend to be paid to the creditors.

Bascom v. *Butterfield*, 536.

See Equity, 8. Execution, 3.

EXECUTORY DEVISE.

See Reversion, 2.

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FACTOR.

See ASSUMPSIT, 7.

FINDING OF GOODS.

See ASSUMPSIT, 6.

FLATS.

1 A creek in which the sea ebbs and flows, and from which the tide does not ebb entirely, is a boundary beyond which the owner of flats cannot recover. *Sparhawk* v. *Bullard*, 95.

2. Under the colonial ordinance of 1641, the ebb of the tide, when from natural causes it ebbs the lowest, and not the average or common ebb, is to be taken as the low-water mark. *Ib.*

3 The rule laid down in the case of *Rust* v. *Boston Mill Corporation*, 6 Pick. 158, for the division of flats in a cove, among conterminous proprietors, recognized and confirmed. *Ib.*

See WRIT OF ENTRY, 1.

FOREIGN PAUPERS.

See PAUPERS, 3.

FORFEITURE.

See ACTION, 1–4. USURY. WILL, 11.

FORGERY.

See WITNESS, 3.

FORMER ACQUITTAL OR CONVICTION.

See INDICTMENT, 4.

FORTS.

See JURISDICTION.

FRAUD.

The holder of a note, who fraudulently procures it to be indorsed by a minor, and afterwards sells it to a person who relies on the validity of such indorsement, is liable to an action by such person, though, at the time of sale, he had no fraudulent intent. Selling the note without erasing such indorsement, or disclosing the minority of the indorser, is tantamount to a direct affirmation by the seller, that the indorsement constitutes a valid contract. *Lobdell* v. *Baker*, 193.

See DECEIT. EVIDENCE, 14. EXECUTION, 3. PARTNERSHIP, 3. PRINCIPAL AND AGENT, 1. TROVER, 2.

FRAUDS, STATUTE OF.

1. An agreement to make machines for a specified price, and to find the materials therefor, is not within the statute of frauds — Rev. Sts. c. 74, § 4 *Spencer* v. *Cone*, 283.

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2. An oral agreement for the sale of mulberry trees growing in a nursery and raised to be sold and transplanted, to be delivered on the ground where they are growing, upon payment therefor being made, is not a contract for the sale of an interest in or concerning lands, &c., within the statute of frauds — Rev. Sts. c. 74, § 1.

Whitmarsh v. *Walker*, 313

3. A license to enter upon land, and remove trees therefrom, passes no interest in the land, and, though not in writing, is valid, notwithstanding said statute. *Ib.*

4. Part performance of an oral contract for the sale of lands, &c., does not take such contract out of the operation of said statute.

Adams v. *Townsend*, 483.

FREIGHT.

See INSURANCE, 7. 8.

GOODS SOLD, &c.

See ASSUMPSIT, 3. 4. CONTRACT, 9. FRAUDS, STATUTE OF, 1. 2.

GUARANTY.

A writing in these words, "I agree to be responsible for the price of goods purchased of you, either by note or account, by H. H. at any time hereafter, to the amount of $ 1000," is a continuing guaranty, to that extent, for goods to be at any time sold to H. H. before the credit is recalled.

Bent v. *Hartshorn*, 24.

GUARDIAN.

Before the revised statutes went into operation, a judge of probate had no authority to license a guardian to sell the real estate of a ward for his benefit, in order to put the proceeds at interest. [But see St. 1830, c. 45.] *Lyman* v. *Conkey*, 317.

No guardians, besides those of minors, can now be, (or ever could be,) lawfully authorized to sell their wards' estate, and place the proceeds at interest, without the previous written consent of the overseers of the poor of the town in which the wards reside. *Ib.*

See PRINCIPAL AND SURETY, 2. 3.

GUNPOWDER.

See ACTION, 2. 4. EXCEPTIONS, 5.

HEIR.

See EQUITY, 7. 8. LIMITATIONS, 3. PLEADING, 3. REQUEST.

HIGHWAY.

See WAY, 3. 4. CERTIORARI.

HUSBAND AND WIFE.

1. Where a husband, by deed in his own name only, conveys his wife's land in fee, and she merely affixes her signature and seal to the deed,

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"In token of her relinquishment of all her right in the bargained premises," her right in fee is not thereby conveyed, and she, after the decease of her husband, may maintain a writ of entry, on her own seizin, to recover the land. *Bruce* v. *Wood*, 542.

2. The *St.* 32 H. VIII. c. 28 — which provides that no act by the husband only shall make any discontinuance of the wife's inheritance or freehold, but that she and her heirs, &c. may lawfully enter thereupon according to their rights — is in force as a part of the common law of this Commonwealth. *Ib.*

3. A deed to husband and wife, executed before the revised statutes took effect, conveying land to be held by them during their lives and the life of the survivor, and by the heirs of their bodies, created an estate tail in the grantees. *Steel* v. *Cook*, 281.

4. Where a husband voluntarily discontinues a libel against his wife for a divorce, she is entitled to a judgment and execution against him for costs. *Stevens* v. *Stevens*, 279.

5. A married woman, who lives apart from her husband, may be indicted alone, and punished, for keeping a house of ill fame.
Commonwealth v. *Lewis*, 151.

6. A married woman's distributive share in an estate survives to her, though it be attached, by the trustee process, in a suit against her husband, if he die before judgment is rendered against him. *Strong* v. *Smith*, 476.

See ADDITION. DIVORCE. TRUSTEE PROCESS, 1.

INCOME.

See TRUST.

INDICTMENT.

1. An indictment on § 5, c. 126, of the revised statutes, which alleges that the defendant wilfully, &c. set fire to and burned "a building erected for a dwellinghouse, and not completed or inhabited," sufficiently and properly describes the offence. *Commonwealth* v. *Squire*, 258.

2. If acts, which constitute a misdemeanor only, are alleged, in an indictment, to have been done feloniously, and the defendant is found guilty by the jury, the word "feloniously" may be rejected as surplusage, and the defendant be punished for the misdemeanor. *Ib.*

3. It is not necessary to aver, in an indictment on § 5, c. 126, of the revised statutes for burning a building, that the building alleged to have been burnt was "other than is mentioned" in § 3. *Ib.*

4. A conviction or acquittal upon a indictment on said § 5, which does not aver that the building, alleged to have been burnt, was "other than is mentioned" in § 3, is a bar to a second indictment on § 3, for the same burning. *Ib.*

See ACTION, 4. ADDITION. HUSBAND AND WIFE, 5. MISDEMEANOR.

INFANT.

A negotiable note made by an infant is voidable and not void; and if he, after coming of age, promise the payee, that it shall be paid, the payee

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may negotiate it, and the holder may maintain an action in his own name against the maker. *Reed* v. *Batchelder*, 559.

INHABITANT.

See JURISDICTION. TAX, 1. 2.

INSOLVENT DEBTOR.

See ASSIGNMENT.

INSOLVENT ESTATE.

See EXECUTOR AND ADMINISTRATOR.

INSURANCE.

1. A part owner of a vessel may insure his actual interest therein, though he do not state to the underwriter the nature or extent of such interest. If he own part of a vessel, as administrator, he may insure it without stating the capacity in which he owns. But a part owner, insuring in his own name only, and not mentioning any other owner or person interested, can recover only the amount of his own interest.

Finney v. *Warren Ins. Co.* 16.

2. One who owns part of a vessel has no insurable interest in the other part thereof, merely by reason of his keeping the accounts, receiving the avails, making the disbursements, and directing the voyages of such vessel. *Ib.*

3. One who procures insurance to be made, in his own name, for another person, or for whomsoever it may concern, cannot maintain an action on the policy, in his own name, if his authority is disavowed or revoked, before action brought, unless there is some express provision, in the policy, authorizing him to sue, or he has a lien or other interest, which the party whose property is insured cannot defeat.

Reed v. *Pacific Ins. Co.* 166.

4. One who thus procures insurance on a vessel, not as a broker or general agent, but in pursuance of a specific order, and under directions to forward the policy to the party who gives the order, has no lien on the policy, nor interest in it. And though he be ship's husband for the general management of the vessel insured, yet he has no lien on the policy for the balance of his account. *Ib.*

5. When an underwriter, who has refused to accept an abandonment of a stranded vessel, takes possession of the vessel *for the purpose of removing, repairing, and restoring* her to the owner, he is bound to use due diligence and despatch, as well in removing as in repairing her; and want of such diligence and despatch in removing her operates as a constructive acceptance of the abandonment, although the repairs are afterwards made with reasonable despatch.

Reynolds v. *Ocean Ins. Co.* 160.

6. The underwriter's duty and liability, in such case, are not varied by a clause in the policy of insurance, that "the acts of the assurer, in *recovering, saving, and preserving* the property insured, in case of disas-

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ter, shall not be considered an acceptance of an abandonment"; such clause being inserted *diverso intuitu*. *Ib.*

7. An insurance of "freight on board" a vessel means the same as "freight of the vessel." *Robinson* v. *Manufacturers' Ins. Co.* 143.

8. Insurance was effected on freight of a vessel at and from Cadiz to a port in Sicily, and at and from thence to her port of destination in the United States. The vessel was lost in the Bay of Cadiz, after being ready to sail for Palermo in Sicily, having on board a very small quantity of goods on freight, and those shipped for her port of destination in the United States. The assured had chartered the vessel, except the cabin, deck, and necessary room for the accommodation of the crew, (reserving to the master the privilege of freight in the cabin,) from Palermo to New York, for $2500, and $35 *per diem* demurrage. *Held*, that the whole freight from Cadiz to Palermo, and from Palermo to the United States, was one entire subject of insurance; that the valuation was not so great as to raise a suspicion of fraud; and therefore that the underwriters were not entitled to have the policy opened, but were liable to a total loss. *Ib.*

9. Where the assured pays for insurance in his own name on the whole vessel, when he owns but part, he is entitled, on a count for money had and received, to a return of premium for the short interest.
Finney v. *Warren. Ins. Co.* 19

INTEREST.

See ASSUMPSIT, 7 DAMAGES, 3. TRUST.

JUDGE OF PROBATE.

See GUARDIAN.

JUDGMENT.

A judgment of nonsuit is no bar to another action for the same cause.
Ensign v. *Bartholomew*, 274.

See ACTION, 6.

JURISDICTION.

Persons who reside on lands purchased by or ceded to the United States for navy yards, forts and arsenals, and where there is no other reservation of jurisdiction to the State than that of a right to serve civil and criminal process on such lands, are not entitled to the benefits of the common schools for their children in the towns in which the lands are situated — nor are they liable to be assessed for their polls and estates to state, county and town taxes, in such towns — nor do they gain a settlement in such towns, for themselves or their children, by residence for any length of time on such lands — nor do they acquire, by residing on such lands, any elective franchise as inhabitants of such towns. 580.

JURY.

Authority of, as to altering a highway — See WAY, 3.

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JUSTICE OF PEACE.

A justice of the peace in Suffolk has no jurisdiction of a complaint against a member of a company of militia in the town of Chelsea for violation of the militia law. Exclusive jurisdiction of such complaint is given to the justices' court for the county of Suffolk. *Belcher* v. *Johnson*, 148.

See EVIDENCE, 9.

JUSTICES' COURT IN SUFFOLK.

See JUSTICE OF PEACE.

LEGACY.

See WILL, 5–7.

LEX LOCI.

See PROMISSORY NOTE, 5.

LIBEL.

For a divorce — See ABATEMENT, 1. DIVORCE.
For a process *in rem* — See EXCEPTIONS, 1. 5.

LICENSE.

See FRAUDS, STATUTE OF, 3. GUARDIAN

LIEN.

See INSURANCE, 3. 4.

LIMITATIONS, STATUTE OF.

1. A memorandum written on a note, by the maker, in these words, "for value received, I hereby acknowledge this note to be due, and promise to pay the same on demand," and signed in the presence of an attesting witness, is itself a "promissory note," within the fourth section of Rev. Sts. c. 120, and an action thereon is not barred by the statute of limitations. But if the original note was without consideration, or the consideration thereof had failed, and there was no new consideration for such memorandum, (or new note,) the payee cannot recover thereon. *Commonwealth Ins. Co.* v. *Whitney*, 21.

2. When a promissory note, made and delivered as a settlement of a demand barred by the statute of limitations, is given up to the maker by the payee, for the purpose of restoring all matters between the parties to the state they were in before the note was given, the act of making and delivering such note is not competent evidence to take the original demand out of the operation of said statute. *Aliter*, it seems, if it be given up for the purpose of leaving open the question of the amount due to the payee, and not the question of the maker's being indebted to him. *Sumner* v. *Sumner*, 394.

3. Under the Rev. Sts. c. 70, § 14, limiting suits against heirs, &c. in certain cases to one year after the right of action accrues, a surety who is

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charged on a bond, after decease of his co-surety may bring his action for contribution against the heirs of the latter within one year from the time payment is made on the bond, and is not limited to a year after breach of the condition thereof. *Wood* v. *Leland*, 387.

LOW WATER MARK.

See FLATS, 2.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MILITIA.

See JUSTICE OF PEACE. ACTION, 8.

MISDEMEANOR.

By the common law, though an indictment alleges that an act, which is a misdemeanor only, was done feloniously, yet it may be supported as an indictment for a misdemeanor. The opinion to the contrary, expressed in *Commonwealth* v. *Newell*, 7 Mass. 245, cannot be sustained. *Commonwealth* v. *Squire*, 262.

MONEY HAD AND RECEIVED.

See EXECUTOR AND ADMINISTRATOR, 2. MORTGAGE, 3. INSURANCE, 9.

MORAL OBLIGATION.

See CONTRACT, 3.

MORTGAGE.

I. *Of Real Estate.*
II. *Of Personal Property.*

I. *Of Real Estate.*

1. A lease for years by indenture, in which the lessor acknowledges the receipt, in advance, of a gross sum, in full for rent of the demised premises during the term, and in which the lessee covenants to reconvey the premises on payment of said sum and interest thereon, is a mortgage; and the rights and duties of the parties are like those of mortgagors and mortgagees of estates of freehold. *Nugent* v. *Riley*, 117.
2. So of a lease prepared in such form, but executed by the lessor only; provided the lessee accepts it and takes possession under it. *Ib.*
3. In the latter case, there is no covenant, technically, on the part of the lessee, upon which an action can be maintained. But if he underlets the demised premises, and receives rent, before the term expires, to the amount of the gross sum advanced, by him, and interest thereon, his estate for years is thereupon defeated, and the lessor is immediately in of his old estate. All that the lessee receives above that amount, is received, not as mortgagee, but for the lessor, who may recover it of him in an action for money had and received. *Ib.*

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4. The tenant of a mortgagor is not liable to him for rent that accrues after the mortgagee has entered and required that the rent shall be paid to himself, and the tenant has agreed to pay him; although the mortgagee's entry may not be effectual for the purpose of foreclosure.
Welch v. *Adams*, 494.

II. *Of Personal Property.*

5. The provision in the Rev. Sts. c. 74, § 5, respecting the recording of mortgages of personal property, applies only to goods and chattels capable of delivery; and not to defeasible or conditional assignments of choses in action. *Marsh* v. *Woodbury*, 436.

6. A debtor, on being called upon by A., one of his creditors, to give security, promised to do so by a mortgage of his personal property: He thereupon directed his attorney to prepare, 1st. a mortgage of his personal property to secure B., another of his creditors; 2d. a mortgage of the same property, subject to the first mortgage, to secure A.; 3d a general assignment of all his property to B., under St. 1836, c. 238, subject to the two mortgages: The mortgages and assignment were all executed and delivered on the same evening, in the order in which they were directed to be prepared, A. not knowing of the mortgage to B. till he received the mortgage to himself, and having no knowledge of the assignment, until after it was executed and delivered, and never afterwards assenting thereto: The mortgage to B. having been adjudged void, because it was part of the assignment, and in contravention of said St. 1836, it was *held* that A.'s mortgage was not part of the assignment; that it was valid by the common law; and that he was entitled to hold the mortgaged property against the attaching creditors of the mortgagor, in the same manner, and to the same extent, as if the mortgage to B. had not been made. *Housatonic and Lee Banks* v. *Martin*, 294.

7. Mortgaged goods were attached by a creditor of the mortgagor, and were sold on the writ, within a week, by consent of the parties to the suit. Before the sale, the mortgagee gave notice of his claim to the officer and creditor, and forbade the sale. The officer replied that he had seen the record of the mortgage, and knew all about it. The mortgagee, about four months afterwards, demanded of the officer and creditor payment of the sum for which the goods were liable to him, and delivered to them a written account of the debt due to him from the mortgagor. On their refusal to pay, he commenced an action of trover against them, which was sustained by the court.
Legate v. *Potter*, 325.

8. Where mortgaged goods were attached, and immediately sold on the writ, by consent of parties, it was held, that the mortgagee, even if he had notice of the sale, was not bound by Rev. Sts. c. 90, § 79, to make demand of payment and present his account of the sum due on his mortgage, before the sale; and that a demand, &c. thirteen days after the sale, was within a reasonable time. *Tapley* v. *Butterfield*, 515.

9. A mortgagee of goods, immediately after they were attached, made a demand and stated an account which were informal and ineffectual, and

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brought an action against the attaching officer, which he prosecuted for thirteen months, and then became nonsuit. Fourteen days before he thus became nonsuit, he delivered to the attaching creditor and officer a just and true account, according to law, of the debt for which the goods were liable, and demanded payment. *Held*, that this last demand was, under the circumstances, within a reasonable time.

Johnson v. *Sumner*, 172.

10. Where a mortgage of goods was made, subject to a prior mortgage thereof, and they were attached by the mortgagor's creditors, and replevied by the first mortgagee, and on the trial of the action of replevin, the first mortgage was decided to be void, and judgment was rendered for a return of the goods to the attaching officer; a demand on the officer, by the second mortgagee, ten days after the rendition of such judgment, accompanied with an account of the debt for which the goods were liable, conformably to the Rev. Sts. *c.* 90, § 79, was held to be within a reasonable time, although it was more than two years after the goods were attached. *Housatonic and Lee Banks* v. *Martin*, 294.

11. When goods are attached, which have been conveyed by one mortgage to two persons, to secure a gross sum of money to each, a statement by them to the attaching officer, on their demanding payment of him, is sufficient, under the Rev. Sts. *c.* 90, § 79, if it set forth the gross sum due to each of them. *Ib.*

12. Under the Rev. Sts. *c.* 90, § 79, which provide that when mortgaged goods are attached, "the mortgagee shall, when demanding payment of the money due to him, state, in writing, a just and true account of the debt or demand for which the property is liable to him, and deliver it to the attaching creditor or officer," the mortgagee may include interest, as well as principal, in such account. And he does not render his account untrue, by understating the amount of interest, if his securities are not in his own hands, or he has not the means of computing the interest exactly. *Johnson* v. *Sumner*, 172.

13. Where a balance, remaining due on a note, is the debt for which mortgaged goods are liable, the mortgagee may well state, in such account, the single sum to which the debt is reduced. But where a mortgage is on condition to secure several demands described in general terms, a statement of the result, composed of the aggregate of several distinct demands, is not a just and true account. *Ib.*

14. Where goods are mortgaged to secure performance of any other obligation than the payment of money, it seems that the only mode of attaching is by summoning the mortgagee as trustee of the mortgagor, according to the provisions of the Rev. Sts. *c.* 109, §§ 25, 26. *Ib.*

MOTION TO QUASH A WRIT, &c.

See ABATEMENT, 2. 3. CORONER. REPLEVIN.

NAVY YARDS.

See JURISDICTION.

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NEW TRIAL.

1. When evidence has been improperly received or rejected, and a verdict is found against the party taking the exception, and a motion for a new trial is made on that ground, such motion will not be granted, if the court can see plainly, from the whole evidence, that independently of the evidence received or rejected, the evidence in support of the verdict so decidedly preponderates, that a verdict the other way would be set aside as against evidence. *Thorndike* v. *City of Boston*, 242.

2. The court has authority to grant a new trial on the ground that a verdict is against the weight of evidence, though the evidence, in whole or in part, was derived from inspection. *Davis* v. *Jenney*, 221.

3. Also in criminal cases brought from the common pleas &c. by exceptions; after overruling the exceptions. *Commonwealth* v. *Peck*, 428.

NONSUIT.

See ACTION, 6. JUDGMENT.

NOTICE.

Knowledge of facts, by a mere stockholder in an incorporated manufacturing company or bank, is not notice to the corporation of the existence of those facts. *Housatonic and Lee Banks* v. *Martin*, 294.

See ATTACHMENT, 1. EVIDENCE, 3. EXECUTION, 4. REQUEST

NURSERY GARDEN.

See ATTACHMENT, 2. SHRUBS AND TREES.

OATH.

See ARREST, 1. 2. PATENT. PLEADING, 5.

OFFICER.

See CORONER. SHERIFF.

OFFICER DE FACTO.

See ACTION, 5.

PARTNERSHIP.

1. A dormant partner is not liable for debts of the firm contracted after a dissolution of the partnership, although he does not give notice of such dissolution. *Grosvenor* v. *Lloyd*, 19.

2. Under an authority, though by parol only, given to one partner by the others, after a dissolution of the partnership, to sell a negotiable note made to the firm before dissolution, he may indorse such note, "without recourse," in the name of the firm. *Yale* v. *Eames*, 486.

3. All the members of a firm are answerable for a fraud committed by one of them — or by their agent acting within the scope of his authority — in the sale of partnership property. *Locke* v. *Stearns*, 560.

4. One partner has authority, without the consent or knowledge of his co-

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partner, to mortgage the whole stock in trade of the firm, to secure a particular creditor of the firm. *Tapley* v. *Butterfield*, 515.

5 The rule, that one partner cannot bind his copartner by deed, does not apply where one partner conveys, by deed, property of the firm which he might have conveyed without deed. Hence a sealed mortgage of the goods of the firm, executed by one partner in the name of the firm, binds all the partners. *Ib.*

PATENT.

It is not necessary to the validity of a patent, that the patentee should take the oath prescribed by law, before the letters patent are granted. *Dyer* v. *Rich*, 180.

PAUPERS.

1 Parts of different towns were formed into a new town, with a provision that the new town should support all the poor who had their legal settlement in either of the towns from which it was formed, and who had removed therefrom, and whose dwellingplace or home was, before such removal, within the limits of the new town. *Held*, that this provision did not include those poor who had removed from the limits of the new town into another part of the same old town, and from thence into another town; but included those only whose *last* dwellingplace or home, previous to such removal, was within the limits of the new town. *Inhabitants of Sutton* v. *Inhabitants of Dana*, 383.

2. Persons confined as convicts in houses of correction, are supported as paupers. 493.

See CONTRACT, 7.

3. Since St. 1839, *c.* 156, took effect, (which imposes on counties the expense of supporting all prisoners in jails and houses of correction, who have no settlement in the Commonwealth,) money raised by towns and cities, under the alien passenger act — St. 1837, *c.* 238, § 3 — cannot be appropriated for the support of aliens who are prisoners in houses of correction, and are unable by labor therein to pay for their maintenance. The term "foreign paupers," in said third section does not now apply to such prisoners. 572.

PENALTIES.

See ACTION, 1. 4.

PHYSICIAN.

Since the repeal of the statute of 1818, *c.* 113, an unlicensed physician or surgeon may maintain an action for professional services rendered before the repeal. *Hewitt* v. *Wilcox*, 154.

PLEADING.

I. *Parties to Actions.*

II. *Declaration.*

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I. *Parties to Actions.*

1. Where a suit is brought in the name of the party to whom a promise was actually made, a mistake in the name of the promisee, as described in the promise, furnishes no ground of defence to the promisor.
Charitable Association, &c. v. Baldwin, 359.

2. An incorporated city need not sue in the name of "the inhabitants of the city," but may sue by its name of incorporation.
Morse v. City of Lowell, 473.

3. Heirs are jointly chargeable as assigns on a covenant of their ancestor which runs with the land that descends to them. Assigns by deed, &c. are also jointly chargeable on a covenant which runs with the land.
Morse v. Aldrich, 544.

See ASSUMPSIT, 8. EQUITY, 1. 7. 8.

II. *Declaration.*

4. In a suit by "the city of Lowell" (the corporate name of the plaintiffs) on a bond, the declaration averred that the bond was made "to the plaintiffs" by the name of "the inhabitants of the city of Lowell." *Held*, on demurrer, that the declaration was sufficient, and that the plaintiffs were entitled to judgment. *Morse v. City of Lowell*, 473.

5. In a declaration against an officer for not returning a bail bond with the writ upon which he returned an arrest and the taking of bail, it is not necessary to allege that an execution against the person who gave bail was returned *non est inventus*, within a year after judgment against him; nor that such person had avoided; nor that the plaintiff in the original action, or any one in his behalf, made the oath, which by Rev. Sts. c. 90, § 111, is required to be made in order to warrant an arrest.
Prescott v. Bancroft, 500.

6. In declaring on a promise to pay money, on demand, if a third person shall fail to do a certain act, it is not necessary to aver a special demand before action brought. *Dyer v. Rich*, 180.

7. A declaration, in trespass *de bonis asportatis*, is ill, even after verdict, if it do not aver the plaintiff's title to the goods. *Carlisle v. Weston*, 26

POOR.

See PAUPERS.

POOR DEBTORS.

See BOND, 2. 3.

POST NOTE.

See PROMISSORY NOTE, 4.

PRESUMPTION.

See EVIDENCE, 2. 5.

PRINCIPAL AND AGENT.

1. The principal is liable, *civiliter*, for the fraud or deceit of his agent committed in the course of the agent's employment. *Locke v. Stearns*, 560

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2. Where a *broker* makes a sale in the usual line of business, his representations bind his principal, although they are made contrary to the principal's express instructions; unless such instructions are known to the purchaser. *Aliter*, in case of particular and special agents.

Lobdell v. *Baker*, 193

See EVIDENCE, 14.

PRINCIPAL AND SURETY.

1. A surety's cause of action against a co-surety or his representatives, for contribution, accrues when, and not before, he pays the debt of the principal. *Wood* v. *Leland*, 387.

2. A surety in a bond given by a guardian, on his appointment, for the faithful discharge of his trust, is not liable thereon for a breach of the guardian's duty in respect to the sale of the ward's real estate, and the application of the proceeds of the sale, when such sale is made pursuant to a license under the statute of 1783, *c.* 32, § 5, upon the ground that it will be for the ward's benefit that the estate should be sold, and the proceeds be put at interest. *Lyman* v. *Conkey*, 317.

3. Where a surety in such bond was appointed judge of probate, and in that capacity decreed an allowance of the guardian's general account, in which the guardian charged himself with the proceeds of the ward's real estate; it was held, in a suit on the bond against such surety, that he was not precluded, by his decree, from showing in defence, that the said charge was in fact for the proceeds of real estate sold by the guardian under a license to sell it, and an order to put the proceeds at interest for the benefit of the ward. *Ib.*

EQUITY, 7. 8. LIMITATIONS, 3.

PROBATE COURT.

See DECREE OF DISTRIBUTION. DOWER, 3.

PROHIBITION.

See CERTIORARI, 2.

PROMISSORY NOTE.

1. A note payable on demand is not regarded as dishonored within one month after its date. *Ranger* v. *Cary*, 369.

2. A note given for a premium of insurance cannot be recovered, if the vessel insured were unseaworthy at the time when the risk would have commenced — the consideration having failed.

Commonwealth Ins. Co. v. *Whitney*, 21.

3. The maker of a promissory note is bound to pay it, upon demand made at any seasonable hour of the last day of grace, and may be sued on that day, if he fail to pay on such demand. *Staples* v. *Franklin Bank*, 43.

4. Post notes, issued by a bank, are payable on demand made at any time, on the last day of grace, after the known and usual hour of opening the bank for business, and may be put in suit on that day, if payment is refused. *Ib*

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5. The indorsee of a note made and indorsed in another State, must do all that is required by the law of that State to charge the indorser, before he can maintain an action against him in this State.

Williams v. *Wade*, 82.

6. It is no defence to an action by an indorsee against the maker of a note, that the note was obtained by the payee, under an agreement with his creditors, to which the maker was not privy, that it should be indorsed and delivered to them, and that it was passed to the indorsee in violation of such agreement. It is immaterial, in such case, whether the indorsee received the note before or after it fell due. *Mack* v. *Clark*, 423.

See Fraud. Infant. Limitations. Set-off, 1. 2. Usury Will, 5. 6.

REAL ACTION.

See Writ of Entry.

RENT.

See Assumpsit, 1. 2. Mortgage, 3. 4.

REPEAL.

See Physician. Trustee Process, 2.

REPLEVIN.

Where a writ of replevin was framed according to the form prescribed by the repealed St. 1789, c. 26, and the officer proceeded in the service thereof, according to that statute, taking and returning a bond from the plaintiff to the defendant with one surety only, and in a certain sum, without causing an appraisement, &c. of the goods replevied, as directed by Rev. Sts. c. 113; it was held that a motion to dismiss the action could not be received after the return term at which the defendant appeared, and that the action should proceed to trial; as the bond, taken and returned by the officer, was valid by the common law, and the court had jurisdiction of the parties and of the subject matter.

Simonds v. *Parker*, 508.

REPORT OF EVIDENCE.

See Action, 9.

REQUEST.

Where the owner of land, by a covenant which binds his heirs and assigns, engages to do a certain act when thereto requested, a written request to do such act, addressed to all the heirs or assigns, and seasonably delivered at the dwellinghouse of one of them, is sufficient; and if they neglect to do the act, they are all liable to an action on the covenant.

Morse v. *Aldrich*, 544.

RETURN.

See Review, 2.

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REVERSION.

1. The reversion expectant on the determination of an estate tail is a vested interest, which may be devised, and which will pass to a devisee under a general residuary clause in a will. *Steel* v. *Cook*, 281.

2. When the owner of such reversion limits the same by way of executory devise, on the contingency of there being issue of a future marriage of one of the tenants in tail, the residuary devisee of the reverson may grant the same to a third person, subject to such executory devise. *Ib.*

REVIEW.

1. When judgment is rendered against a party who had no notice of the pendency of the suit, a review will be granted, on his showing probable grounds of defence. *Bewer* v. *Holmes*, 288.

2. On a petition for a review, upon the ground that the party had no notice of the original action, evidence is admissible to contradict an officer's return which states that he gave the party a summons for his appearance at court. And though the record shows that the petitioner appeared to the original action, by attorney, evidence is admissible that such appearance was at the request of a third person, and without the petitioner's knowledge. *Ib.*

ROAD.

See WAY.

SCHOOLS.

See JURISDICTION.

SCIRE FACIAS.

See TRUSTEE PROCESS, 2. 3.

SEIZIN.

See COVENANT, 1. 2. EXECUTION, 5. WRIT OF ENTRY.

SET-OFF.

1. Where the maker of a promissory note is sued thereon by the payee, and has a demand against a third person, which the payee was not originally bound to pay, such demand cannot be set off against the note in consequence of the payee's having made a valid engagement that the maker shall receive such demand out of the payee's estate after his decease. *Foot* v. *Martin*, 273.

2 Where a negotiable note, payable on demand, was transferred and delivered by the payee to a third person, within a month after its date, for a valuable consideration, but was not indorsed to him until two years afterwards; it was *held*, in an action by the indorsee against the makers, that they could not set off against said note a demand which was due to them from the payee at the time of the making of the note and of the transfer thereof by delivery. *Ranger* v. *Cary*, 369.

3. The provision in the Rev. Sts. *c.* 96, § 8, that where there are several

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defendants, a demand against the plaintiff cannot be set off unless it is due to the defendants jointly, applies as well where the defendant to whom the demand is due is principal, and the other is surety, as to other cases. It also applies where the plaintiff brings an action in trust, or for the use or benefit of another. *Warren* v. *Wells*, 80.

4. The remedy for one of several defendants, who has a demand against the plaintiff, is under the Rev. Sts. c. 90, § 50, by cross action and set-off of judgments, by allowance of the court. *Ib.*

SETTLEMENT.

See JURISDICTION. PAUPERS.

SHERIFF.

1. Where a debtor and his attaching creditors agree in writing that the attached goods may be sold, by the deputy sheriff who attached them, either at public or private sale, at his discretion, and that the proceeds shall be held to respond the judgments, which may be rendered against the debtor, according to the revised statutes, and the deputy sells the goods, partly at private and partly at public sale, and receives the money therefor, but neglects to apply it in satisfaction of executions, issued on judgments recovered by such creditors, and seasonably put into his hands, the sheriff is answerable for such default of his deputy.

New Hampshire Savings Bank v. *Varnum*, 34.

2. A officer, who arrests a judgment debtor on execution, cannot lawfully hold him in custody against his consent, in order to procure an interview with the creditor, or his attorney, for the purpose of negotiating with the debtor, or for the purpose of the creditor's giving further directions to the officer as to the service of the execution.

French v. *Bancroft*, 502.

3. If a judgment creditor direct an officer to arrest the debtor on execution, but not to commit him until further orders, the officer is justified in not arresting him. *Ib.*

4. An officer, who is lawfully directed to arrest a defendant on a writ, is answerable to the plaintiff, if he take a bail bond to which the sureties' names are forged, and thereupon discharge the defendant from custody.

Marsh v. *Bancroft*, 497.

See ARREST. PLEADING, 5.

SHRUBS AND TREES.

Shrubs and trees, in land demised to be used as a nursery garden, are personal chattels, as between the lessor and the lessee and his assigns, and may be severed and removed. *Miller* v. *Baker*, 27.

See ATTACHMENT, 2. FRAUDS, STATUTE OF, 2.

SLANDER.

In an action of slander, the defendant pleaded the general issue, and gave notice that he should justify speaking the words by proving them to be

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true. On the trial, he gave evidence tending to prove the truth of the words. The judge instructed the jury that if they were satisfied that the defendant made the charge against the plaintiff, which was alleged in the declaration, they should find a verdict for the plaintiff, unless upon the whole evidence, they were satisfied that the charge was true; that the burden of proof was on the defendant to establish that fact; and that if the jury doubted as to that fact, they should find for the plaintiff *Held*, that this instruction was correct. *Sperry* v. *Wilcox*, 267.

See Costs, 1. Evidence, 10.

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3 Geo. III. }

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STREETS IN BOSTON.

See Certiorari, 1.

SUPPLEMENTAL BILL.

See Equity, 3. 4.

SURETY.

See Principal and Surety. Equity, 7. 8.

SURGEON.

See Physician.

SURVIVORSHIP.

See Husband and Wife, 6. Trustee Process, 1.

TAX.

1. A citizen of Boston, who had been at school in the city of Edinburgh when a boy, and formed a predilection for that place as a residence, and had expressed a determination to reside there, if he ever should have the means of so doing, removed with his family to that city, in 1836, declaring at the time of his departure, that he intended to reside abroad, and that if he should return to the United States, he should not live in Boston. He resided in Edinburgh, and the vicinity, as a housekeeper, taking a lease of an estate for a term of years, and endeavoured to engage an American to enter his family for two years, as instructor of his children. Before he left Boston he made a contract for the sale of his mansion house and furniture there, but shortly afterwards procured said contract to be annulled, (assigning as his reason therefor, that in case of his death in Europe, his wife might wish to return to Boston,) and let his house and furniture to a tenant. *Held*, that he had changed his domicil, and was not liable to taxation as an inhabitant of Boston, in 1837.
Thorndike v. *City of Boston*, 242.

2. A native inhabitant of Boston, intending to reside in France with his family, departed for that country in June, 1836, and was followed by his family about three months afterwards. His dwellinghouse and furniture

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were leased for a year, and he hired a house for a year, in Paris. At the time of his departure he intended to return and resume his residence in Boston, but had not fixed on any time for his return. He returned in about sixteen months, and his family in about nine months afterwards. *Held*, that he continued to be an inhabitant of Boston, and that he was rightly taxed there, during his absence, for his person and personal property. *Sears* v. *City of Boston*, 250.

3. Under the Rev. Sts. c. 7, § 5, exempting houses of religious worship from taxation, such distinct tenements only are exempted, as are used for religious worship and purposes connected therewith; and not tenements, though under the same roof, which are used for purposes wholly secular. *Proprietors of Meetinghouse* v. *City of Lowell*, 538.

4. Where the only defect in a warrant, issued by assessors to a collector of taxes, is an omission to direct him to sell distrained goods within seven days, he is justified, by such warrant, in distraining goods, and selling them within seven days, according to law.

King v. *Whitcomb*, 328.

5. A demand, by a collector, of payment of a tax assessed on a non-resident, who has no agent or attorney within the Commonwealth, is sufficient to justify a subsequent seizure and sale of his goods, if such demand be made at his last and usual place of abode in the town where he is taxed. *Ib.*

See Evidence, 12. Jurisdiction.

TENANT IN COMMON.

Where one of several tenants in common of the right to dig and remove ore from another's land enters and digs, and removes ore therefrom, the owner of the land cannot maintain trespass against him on the ground that he did not first give notice to his cotenants, according to the provision of the Rev. Sts. c. 105, § 7, of his intention to enter, &c.

Arnold v. *Stevens*, 266.

See Assumpsit, 1. 2. Execution, 2. Will, 11. 12.

TOWN.

A town has no authority, it seems, to erect an embankment, or other separate work, wholly detached from a road, for the purpose of facilitating the making, maintenance or future repair of the road; nor have county commissioners authority to require of a town the execution of such a work. *Anthony* v. *Inhabitants of Adams*, 286.

See Action, 7.

TOWN WAY.

See Way, 1. 2. Certiorari.

TREES.

See Shrubs and Trees.

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TRESPASS.

Trespass *de bonis asportatis* is maintained by proof that the defendant unlawfully exercised an authority over the chattels, against the will and to the exclusion of the owner, though there was no manual taking or removal. *Miller* v. *Baker*, 27.

See Disseizin, 1. 2. Pleading, 7. Tenant in Common.

TRESPASS ON THE CASE.

See Action, 1. Usury, 3.

TROVER.

1. If A. obtain the goods of B. by misrepresentation and fraud, although under the forms of a sale, and sell them to C. who has knowledge of such fraud, B. may maintain trover for them against C. without a previous demand. *Stevens* v. *Austin*, 557.

2. Where B. received the promissory note, &c. of A. for goods which A. fraudulently obtained of him and sold to C. who had knowledge of the fraud; it was held, that B. might maintain an action of trover for the goods against C. without restoring the note to A. *Ib.*

See Damages, 3. Dog.

TRUST.

Where property, real and personal, was devised in trust, the rents, issues, and income thereof to be paid to the *cestui que trust*, and a part of the real estate was taken for a railroad, and the damages thereby caused were paid to the trustee; it was held that such damages were not income, &c. to be paid to the *cestui que trust*, but were a substituted capital, of which the interest only was payable to him. *Gibson* v. *Cooke*, 75

TRUSTEE PROCESS.

1. Where an administrator, who has in his hands a distributive share of an estate which accrued to a married woman is summoned as trustee, in an action against her husband, he will be discharged if the husband die while the action is pending; as the wife's right of survivorship is not devested, in such case, until judgment. *Strong* v. *Smith*, 476.

2. The direction in the Rev. Sts. c. 146, § 5, that proceedings, in suits pending when the former statutes were repealed, shall be conformed to the provisions of the revised statutes, extends to the case of *scire facias* against trustees. *Burnside* v. *Newton*, 426.

3. On a *scire facias* against a trustee who was charged, by consent, on his answer in the original suit, he may make such additional answers, even respecting facts which existed at the time of the first answer, as may be necessary or proper for his defence. But where a trustee came in with such new answer, at a late period, and after costs had accumulated, it was received only upon terms, viz. that he should pay the costs of the *scire facias*, and take no costs thereon as the ultimately prevailing party. *Ib.*

See Assignment, 3.

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UNITED STATES.

Land ceded to. See JURISDICTION.

USURY

1 In an action on a promissory note payable in one year, "with nine per cent. interest," the forfeiture to be deducted, under the Rev. Sts. c. 35, § 2, is only three times the amount of nine per cent. for one year; that being threefold the amount of the whole interest reserved.

Sumner v. *Williams*, 398.

2. The inception of a note, made payable to the maker's own order and by him indorsed, is upon its indorsement; and therefore where, in a suit thereon by the first indorsee, the jury were instructed that if they believed it was usurious in its inception, they should deduct the forfeiture of threefold interest reserved, the instruction was held to be right.

Little v. *Rogers*, 108.

3. A party, who pays a greater rate of interest than is allowed by law, cannot recover back threefold the amount of the interest paid, by an action of trespass on the case, but only by an action of debt or a bill in chancery, as provided by the Rev. Sts. c. 35, § 3. *Wiley* v. *Yale*, 553.

See AMENDMENT. COSTS, 5. WITNESS, 4.

VERDICT.

Where a verdict, which is decisive of the case, is found on one or more of several issues, and the jury cannot agree as to another issue, the party, in whose favor the verdict is found, may waive the other issue, or consent that a verdict be entered thereon against him.

Inhabitants of Sutton v. *Inhabitants of Dana*, 383.

See EXCEPTIONS, 5. INDICTMENT, 2.

VOUCHER.

See AUDITOR, 2.

WAIVER.

See BOND, 1. VERDICT.

WARRANTY.

A. agreed to procure and deliver to B. the note of W. indorsed by two other persons, and afterwards wrote to B. this letter — "I enclose you the note of W.'s, as proposed, which you will please pass to my credit." *Held*, that this was tantamount to a warranty that the indorsements on the note enclosed in the letter were genuine. *Coolidge* v. *Brigham*, 547.

See FRAUD.

WAY.

1. Under the Rev. Sts. c. 24, a town way may be legally laid out by selectmen, and accepted by the town, though the warrant for the town meeting at which such way is accepted is dated and issued before the way is laid out. *Harrington* v. *Harrington*, 404.

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2 Selectmen laid out a town way over the land of A., and awarded him damages, to be paid by B. before the road should be opened. The town voted to accept the report of the selectmen, on condition that B. should "build the road and pay all expenses of the same, and defend the town against all prosecutions." The damages awarded to A. were tendered to him before his land was entered upon. *Held*, that the way was legally established, and therefore that A. could not maintain an action against those who entered upon his said land for the purpose of constructing the road. *Ib.*

3 A jury has authority, under the Rev. Sts. c. 24, § 13, to make alterations in a highway that has been located anew by county commissioners. *State Lunatic Hospital* v. *County of Worcester*, 437.

4. A possessory title to land, over which a highway is located, is sufficient to entitle the party in possession, who is aggrieved by the doings of the commissioners, to have a jury to determine the matter of his complaint. *Ib*

See ACTION, 7. CERTIORARI. TOWN.

WIDOW.

See DOWER.

WILL.

1. It is not necessary that the attesting witnesses to a will should subscribe it in the presence of each other. *Dewey* v. *Dewey*, 349.

2. It is sufficient *primâ facie* evidence that the attesting witnesses to a will subscribed it in the presence of the testator, if he were so situated that he might have seen them subscribe it. *Ib.*

3. Where one of the attesting witnesses to a will has no recollection of having subscribed it, but testifies that the signature of his name thereto is genuine; the testimony of another attesting witness, that the first did subscribe his name in the testator's presence, is sufficient evidence of that fact. *Ib.*

4. A will subscribed by three witnesses at the testator's request and in his presence, he declaring it to be his will, is well attested within the Rev. Sts. c. 62, § 6, although neither of the witnesses saw him sign it or heard him acknowledge his signature thereto, and only one of them saw the testator's name thereon. *Ib.*

5 Promissory notes and other securities for the payment of money will pass by a bequest of money, where such is manifestly the intention of the testator. *Morton* v. *Perry*, 446.

6 A testator, after reciting that he had sold his real estate and paid to his heirs, in cash, the largest part of their portions, and that he was making his will, "dividing the residue," gave legacies to his wife and two of his heirs, in full of their portions: He then bequeathed to his three other heirs all the money which should be left at his decease: At the date of his will, almost all his property consisted of promissory notes and money on hand: The amount of money then on hand could not be ascertained; but he commonly had not more than twenty or thirty dollars: At his decease, he had promissory notes to the amount of more than $2300, and

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only $ 31 in money. *Held*, that the money due on his notes, at his decease, passed by the bequest of money left. *Ib.*

7. A testator, after bequeathing to his wife a portion of his property, added a clause to his will, in which he requested that a person, to whom he had bequeathed nothing, might provide for her a chaise, or other suitable conveyance, and attend her whenever and wherever she might wish to go, for a suitable compensation, if she should desire it. *Held*, that this was too vague and indefinite to be construed as a legacy to the wife. *Whipple* v. *Adams*, 444.

8. Where a testator, at the time of making his will, (before the Rev. Sts. took effect,) held land in mortgage, and devised all his real estate, and afterwards foreclosed the mortgage, it was held that such land did not pass by the will. *Brigham* v. *Winchester*, 390.

9. B., by his will, gave to his wife, in common with his daughter, the use of certain rooms in a house, and also gave to his daughter, in common with his wife, the use of the same rooms; which use the daughter was to have so long as she should remain unmarried. *Held*, that after the death of the wife, the daughter, remaining unmarried, was entitled to the sole use of the rooms. *Jarvis* v. *Buttrick*, 480.

10. A testator devised to his wife "the Haynes place, with the Pierce lot, meaning to include all my real estate that lies west of the Shirley road, except what belongs to the Bennet place." The Bennet place and the Haynes place extended both sides of the road. The testator owned a lot, called the Page lot, the easterly side of which adjoined the westerly part of the Bennet place; but after he purchased the Bennet place, he removed the fence between that place and the Page lot, and occupied both in common for fifteen years next before his death. *Held*, that the Page lot did not pass to the wife, by the devise. *Harris* v. *Harris*, 400.

11. A testator, after giving pecuniary legacies to eight of his children in full of their respective portions of his estate, devised to his children, C. and R., all his real estate in fee, upon condition that neither of them should make any claim upon his estate, and that if either of them should make such claim, he should have no right under the will: C. made a claim upon the testator's estate, which was paid by the executor. *Held*, that C. and R. took the real estate as tenants in common, upon a condition subsequent, by breach of which C. forfeited his moiety thereof under the will, and that the same descended to the testator's heirs at law. *Sackett* v. *Mallory*, 355.

12. A clause added to a devise of a fractional part of certain land, that it is "to be taken by the devisee where he shall choose or select, at its just or proportionate value," does not constitute a condition precedent to the vesting of the estate devised; but the devisee, on the death of the devisor, becomes tenant in common, with a right of selection, to be exercised or not, at his will. *Brown* v. *Bailey*, 254.

See Reversion. Trust.

WITNESS.

1. In an action by the indorsee against the maker of a promissory note which was indorsed after it was due and dishonored, the indorser is a

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[illegible]

2 [illegible]

3 [illegible]

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[illegible]

1. It is a rule of entry to recover land, where both parties claim under a common ancestor or predecessor, the demandant cannot prevail unless he shows that his title accrued prior to the time under which the tenant claims, or that a title was vested by disseisin. A mere possessory title would be good against a stranger, is not sufficient for such a title may be defeated by a subsisting entry. *Sparhawk v. Bullard*, 35.

2. A possessory title will not avail against the true owner of land, however long continued, unless the claimant has had such an open and exclusive possession as amounts to a disseisin. *Ib.*

3. If a demandant shows that he, or those under whom he claims, had an actual entry and possession prior to the tenant's entry, he is entitled to recover, although he may have no other title to the land than such possession, unless the tenant shows a better title in himself, or in those under whom he claims. *Ib.*

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competent witness to prove that the note was paid before it was indorsed. *Thayer* v. *Crossman*, 416.

2. The rule, that a witness shall not be permitted to invalidate a security which he has put into circulation, and given credit to by his transfer, is confined to negotiable instruments indorsed and put into circulation in the usual course of business, and does not apply to a note overdue, or otherwise dishonored. *Ib.*

3. On the trial of an indictment for forgery, the party, whose signature is alleged to be forged, is a competent witness to prove the forgery and also the destruction of the instrument alleged to be forged, although civil actions are pending against him to which his only defence may be the forgery of said instrument. *Commonwealth* v. *Peck*, 428.

4. Under the St. of 1826, *c.* 27, § 5, and the Rev. Sts. *c.* 35, § 4, the maker of a note, payable to his own order and by him indorsed, is a competent witness, in a suit against him by the first indorsee, to prove the defence of usury. *Little* v. *Rogers*, 108.

5. Where in a suit to recover pay for goods sold, the plaintiff offers a witness whom the defendant proves that the plaintiff has declared to be jointly interested with him in the goods, a release to the plaintiff, by the witness, of all his interest in the goods, renders him a competent witness for the plaintiff. *Bemis* v. *Charles*, 440.

WORK AND LABOR.

See Assumpsit, 3.

WRIT.

Exceptions to, or to service of, when to be taken.

See Abatement, 2. 3. Coroner. Replevin.

WRIT OF ENTRY.

1. In a writ of entry to recover flats, where both parties claim under a common ancestor or predecessor, the demandant cannot prevail unless he shows that the flats demanded were assigned to the party under whom he claims, in the division of the ancestor's estate, or that a title has been acquired by disseizin. A mere possessory title, which would be good against a stranger, is not sufficient; for such a title may be acquired by a tortious entry. *Sparhawk* v. *Bullard*, 95.

2. A possessory title will not avail against the true owner of land, however long continued, unless the claimant has had such an open and exclusive possession as amounts to a disseizin. *Ib.*

3. If a demandant shows that he, or those under whom he claims, had an actual seizin and possession prior to the tenant's entry, he is entitled to recover, although he may have no other title to the land than such possession, unless the tenant shows a better title in himself, or in those under whom he claims. *Ib.*

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